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No. 90-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NORMAN HARTNESS, *et al.*,

Petitioners,

v.

GEORGE HERBERT WALKER BUSH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Of Counsel:
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May 3, 1991

QUESTIONS PRESENTED

1. Whether over two million federal and federally regulated employees can constitutionally be subjected to repeated mandatory random urinalysis drug testing solely on the basis of holding a "secret" clearance.

2. Whether mandatory random urinalysis drug testing of federal employees can be justified by reasons first articulated in litigation by agency counsel, and not relied upon by the agency in its original drug testing plan.

THE PARTIES

Plaintiffs below and petitioners herein are Norman Hartness, James Fish, Janet Irwin, Mark Taylor, Bruce D. Beard, Joel Kaplan, Barbara Doran, Johnna Robinson, Donna L. Ferrantello, Frederick S. Davidson, Richard Kristobek, Nancy Adams, Margaret Ricci, Laura Kneale Anderson, Suzanne Troje, David Weiss, Donald Abelson, Barbara Norton, Richard Meier, Kenneth P. Freiberg, Maryanne Beatty, Christopher Parlin, Peter Collins, Cecyl Ivie, Gordana Slijepcevic, Dee Conway, Dorothy Dwoskin, Christina M. Lund, Mark Z. Orr, and Charles E. Roh, Jr.

Defendants below and respondents herein are George Herbert Walker Bush, President of the United States, and Philip D. Larsen, Drug Program Coordinator, Office of Administration, Executive Office of the President.

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NORMAN HARTNESS, *et al.*,

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinions of the district court are reported at 712 F. Supp. 986 (D.D.C. 1989) (Appendix at 26a, hereinafter referred to as "__a"), *vacated in part*, 751 F. Supp. 1 (D.D.C. 1990) (58a). The opinion of the court of appeals is reported at 910 F.2d 170 (D.C. Cir. 1990) (4a).

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1990. On February 4, 1991, petitioners' petition for rehearing and suggestion for rehearing en banc was denied. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the fourth amendment, to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This case also involves Executive Order No. 12,564, which is set out verbatim in the Appendix (63a).

STATEMENT OF THE CASE

The principal issue in this case is whether federal employees holding "secret" security clearances can, *ipso facto*, be required to submit to repeated mandatory random urinalysis drug testing, to prove that they are "drug-free." Petitioners submit that the decision below, which approved such testing, is excessive in scope and inconsistent with this Court's decision in *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989) ("*Von Raab*").

The issue is important not only to the EOP employees involved, whose Fourth Amendment rights have been abrogated by the *per se* approach approved by the panel, but literally to over two million federal and federally regulated employees. According to a recent report by the General Accounting Office, more than a million federal employees and nearly a million contractor employees have "secret" clearances.[1] The Fourth Amendment rights of all of these employees are potentially affected by the decision of the court below. In addition, the government made clear in this case its intention to seek to extend a favorable ruling to federal employees with lesser clearances. Thus, hundreds of thousands of federal and contractor employees who hold "confidential" clearances, and, indeed, all federal employees who have access to

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1 *See* GAO, "Information Security: Update Of Data On Employees Affected By Federal Security Programs" (NSIAD-9-56FS Mar. 1989), at p.12.

nonpublic information, are also at risk. As Judge Edwards pointed out in his dissent to the decision of the court below, it takes little analytical imagination to extend the panel's holding to those employees as well. *Hartness v. Bush*, 919 F.2d 170, 180 (Edwards, J., dissenting) (24a).

The Petitioners

Petitioners in this case are 30 employees working in three agencies within the Executive Office of the President: The Office of Administration ("OA"), the Office of Management and Budget ("OMB") and the Office of the United States Trade Representative ("USTR"). The three OA employees are computer programmers or analysts; the six OMB employees are all budget examiners; the 21 USTR employees cut across a wide variety of occupations including secretaries, economists, lawyers and trade specialists. All 30 have been designated for mandatory random urinalysis drug testing (hereinafter "random testing") under the EOP drug testing plan ("the EOP Plan").[2]

All 30 petitioners are employees in good standing, and many are distinguished members of the Federal Service. A number of them have won a variety of awards and

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2 *See Hartness v. Bush*, No. 89-0044-LFO, First Amended Complaint, filed March 15, 1989, reproduced in the Joint Appendix in the court below at 173-77.

commendations from numerous Presidential administrations.[3] About half of them have been Federal employees for over a decade, and three have over 25 years of Federal service.

Eleven of the petitioners hold "secret" clearances and are the immediate focus of this petition. (Another 18 hold "top secret" clearances, and one has no clearance.) Of those 11, there are two OA computer specialists, one OMB budget examiner, two USTR economists, four USTR section directors or managers, and two USTR secretaries.[4]

No evidence was adduced in the proceedings below that any of the petitioners have ever used illegal drugs. Indeed, the evidence affirmatively showed that no significant drug abuse problem exists at EOP. As the district court found, "[t]here is no evidence in the record that

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3 *See* Affidavits and Declarations of Norman Hartness, James Fish, Janet Irwin, Mark Taylor, Bruce Beard, Joel Kaplan, Barbara Doran, Johnna Robinson, Donna Ferrantello, John Kingery, Frederick Davidson, and Margaret Ricci, reproduced in the Joint Appendix in the court below at 18-63 *See also Hartness v. Bush*, No. 84-0044-LFO, First Amended Complaint, filed March 15, 1989, reproduced in the Joint Appendix in the court below at 174-77.

4 *See Hartness v. Bush*, No. 89-0044-LFO, First Amended Complaint, filed March 15, 1989, and the Second Declaration of Charles Easley, filed July 19, 1989, reproduced in the Joint Appendix in the court below at 174-77 and 279-80, respectively.

there has ever been a case of bribery, any compromise of classified documents or other national security information, or any other serious misbehavior by any EOP employee." *Hartness v. Bush*, 712 F. Supp. 986, 988 (D.D.C.1989). (30a).

The EOP Plan

Under the EOP Plan the entire OA is designated for testing (77a-78a), as is the entire USTR (102a) and over a third of the employees at OMB (87a). Thus, clerical assistants, clerk-typists, mail clerks, secretaries and support services specialists are all subject to the same random mandatory urinalysis testing under the EOP Plan.

Notwithstanding the fact that the government advocated and relied on a *per se* rule in the court below for testing employees with "secret" clearances, no such rule was articulated in the EOP Plan. Indeed, the justification for testing the two OA employees who are petitioners in this appeal had nothing to do with their clearances or access to sensitive information. Rather, the EOP Plan designates their positions for testing because their work locations are such that drug usage "could result in actions that would jeopardize the life of the President." (80a-81a). This justification was rejected by the district court as to these particular employees and was not relied upon by the government in the court of appeals. The district court found that this justification was unsupported by the record because there was no evidence that any of the petitioners would have unguarded access to the President or Vice President. 712 F. Supp. at 987, and n.5. (29a).

Similarly, the USTR appendix simply lists a series of justifications for testing, only one of which is access to sensitive information, and then specifies every USTR position as subject to those various justifications. No effort is made to relate specific positions to specific justifications, nor is there any discussion of possession of a "secret" clearance as a justification in and of itself. (101a-103a). In the same vein, the OMB portion of the EOP Plan does not discuss persons with "secret" clearances as a separate category, but instead groups them with employees with "Top Secret security clearances or other special security clearances." (89a).

The Proceedings Below

This case was filed in the United States District Court for the District of Columbia on December 8, 1988. On May 19, 1988, that court preliminarily enjoined random mandatory urinalysis drug testing of petitioners under the EOP Plan. The district court relied on the then-recent decisions of this Court in *Von Raab* and *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) ("*Skinner*"), and concluded that, on the basis of the Fourth Amendment balancing test set out in those decisions, the government was unlikely to be able to show on the merits a sufficiently compelling interest to sustain random testing. The district court was particularly critical of the government's failure to compile a record attempting to justify its proposed course of action: "These employees,

individually and collectively, may be presumed to be civilized men and women, no one of whom should be subjected to supervised elimination on a record such as this." *Hartness v. Bush*, 712 F. Supp. at 993 (46a).

Several months after the issuance of the preliminary injunction, the court below issued its opinion in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990) ("*Harmon*"). The *Harmon* decision, inter alia, allowed random drug testing of employees with "top secret" clearances in the specific circumstances of that case. On January 26, 1990, relying on *Harmon*, the district court in this case granted the government's motion to modify the earlier-issued preliminary injunction to allow testing of EOP employees with "top secret" clearances. At the same time, the district court rejected the government's request to extend *Harmon* to employees with "secret" clearances. The government appealed the district court's refusal to modify and vacate its preliminary injuction as to employees with "secret" clearances.

The court below issued a 2-1 panel decision on November 16, 1990. It justified the validity of mandatory random urinalysis drug testing solely on the basis that the employees involved possess "secret" national security clearances, without regard to such factors as the type of sensitive material to which the employees are likely to be exposed and the employees' individual working environments.

In dissent, Circuit Judge Edwards wrote that, "the District Court correctly concluded that governing law does

not allow random testing of employees with secret security clearances solely because of those clearances and regardless of surrounding circumstances." *Hartness*, 919 F.2d at 174. (12a). In Judge Edwards' view, the majority decision "departs . . . from *Von Raab* when it creates a new exception to the Fourth Amendment balancing test for drug testing of secret clearance holders." *Id.* at 180. (24a).

REASONS FOR GRANTING THE WRIT

This petition presents an issue of national importance, which will have a direct impact on over two million federal and federally regulated employees.[5] It involves the unreasonable, automatic imposition of mandatory random urinalysis drug testing on federal employees holding the label of a "secret" clearance without the case-by-case inquiry mandated by this Court in *Von Raab*. In effect, the court below has ruled that, under *Von Raab*, the "secret" clearance may be used as a proxy for a fact-specific inquiry. This Court's holding in *Von Raab* -- which was not even a

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5 At the end of 1987, approximately 1.9 million federal employees of 48 agencies (including the OA, OMB and USTR) responding to a General Accounting Office survey held "top secret," "secret," and "confidential" security clearances. An additional 1.3 million contractor employees held identical clearances. The majority of such clearances were "secret" comprising approximately 1.3 million federal employees and 850,000 contractor employees. *See* GAO, "Information Security: Update of Data on Employees Affected By Federal Security Programs" (NSIAD-9-56FS Mar. 1989).

random testing case -- has thus been held to justify random testing without even minimal case-by-case justification.

I. The Categorical Approach Of The Court Below, Allowing Testing Of All EOP Employees With "Secret" Clearances, Is Excessive In Scope And Inconsistent With This Court's Decision In *Von Raab*.

Any discussion of the constitutionality of random drug testing of Federal employees on the ground of access to sensitive information must begin with *Von Raab*. In *Von Raab*, this Court upheld mandatory urinalysis testing of Customs Service employees who sought promotion or transfer to positions involving front-line drug interdiction responsibilities and/or the carrying of firearms. The Court's decision was based on the government's interest in ensuring public safety and the fitness and integrity of its front-line drug interdiction personnel.

However, the government also sought to justify testing on the basis of the employees' access to classified material. While this Court recognized that the government has a compelling interest in protecting "truly sensitive" information, 489 U.S. at 677, it observed that employees holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger" were subject to testing on the ground of access to sensitive information, when it was not clear whether these employees were "likely to gain access to sensitive information." *Id.* at 678.

Unable to resolve the matter on the basis of the record, this Court remanded the case for further factual development, instructing that on remand the lower court

> should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

Id.

The positions at issue in this case are similar to *Von Raab* in their broad diversity. For instance, at the USTR, the United States Trade Representative is designated for testing on the very same grounds as Research Assistants, Secretaries and Support Services Specialist. (104a-106a). *Von Raab* clearly mandates a fact-specific, case-by-case approach to assessing the constitutionality of imposing mandatory random drug testing on these test designated positions. The court below dispensed with that requirement, relying instead on the mere label of a "secret" clearance as a proxy for an individualized examination of the justification for random testing.

The majority's rationale for its decision was the *per se* rule it adopted in *Harmon*, allowing the testing of top secret clearance holders without a fact-specific analysis.

Hartness is more precisely an extension of *Harmon* to employees with "secret" clearances.[6] But *Harmon* was not correctly decided, and an extension of that *per se* approach to "secret" clearance holders is not defensible under either the Fourth Amendment or *Von Raab*. Moreover, the Government has never suggested that the case-by-case approach mandated by *Von Raab* entails a level of administrative burden that would justify abandoning this Court's holding.

Other federal courts have more accurately perceived the mandate of *Von Raab*. *See American Federation of Government Employees v. Wilson*, 1990 U.S. Dist. LEXIS 15207, at pp. 28-29 (E.D. Cal. 1990) ("[U]ltimately the question of whether the government's decision to subject a given category of workers to random testing must be decided on a case-by-case basis by reference to the general principles articulated [in *Von Raab* and *Skinner*], with the government bearing the ultimate burden of persuasion that such a nexus exists.") The conflict between this approach and that of the court below could not be clearer.

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6 Both members of the majority indicated their view that they were constrained by *Harmon*, and Judge Silberman specifically wrote that, "we are not free to examine its holding other than *en banc*." *Hartness*, 919 F.2d at 173 n.2 (9a). Obviously, by granting this petition, this Court would be free to examine the wisdom of the per se rule in *Harmon*, as well.

The holding of the court below implies that any employee with a "secret" clearance must necessarily be exposed to the type of "truly sensitive" information referred to in *Von Raab*. But the record in this case shows otherwise. Consistent with the dictates of *Von Raab*, the district court in this case did perform a fact-specific analysis, the results of which were ignored under the court of appeals' *per se* rule. The analysis was revealing. With respect to whether petitioners would likely be exposed to "truly sensitive" information the district court found: "Affidavits filed by a sampling of 8 EOP plaintiffs indicate that none has a security clearance that would enable him or her access to information related to sensitive military secrets or plans, or strategic national security issues." *Hartness*, 712 F. Supp. at 988 (footnote omitted) (30a-31a). A review of the declarations and affidavits filed by plaintiffs reveals that the nature of the classified information seen by USTR employees involves "ongoing trade negotiations and trade disputes with foreign countries . . . information that is commonly available to lower- and mid-level professional employees in other U.S. agencies and departments . . ."[7]

Moreover, the district court also noted that all of the plaintiffs work in traditional office environments and thus

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7 *See* Declaration of Donald Abelson, Maryanne Beatty, Kenneth Freiberg, Margaret E.A. Ricci and Frederick S. Davidson, reproduced in the Joint Appendix in the court below at p. 223.

"operate under close supervision" (*id.* at 987; 30a), another factor identified by this Court in *Von Raab*. And, as noted in the Statement of Facts, "[t]here is no evidence in the record that there has ever been a case of bribery, any compromise of classified documents or other national security information, or any other serious misbehavior by any EOP employee." *Id.* at 988 (30a).

As the dissenting judge below wrote, the majority decision "with respect to an entire class of federal employees, [relieves] the Government of its obligation to justify testing as reasonable in light of all attendant circumstances," even though there is "no 'real evidence of a real problem that will be solved by urine testing,'...." 919 F.2d at 181(25a), citing *Von Raab*, 489 U.S. at 681.[8] Justice Scalia, dissenting in *Von Raab*, similarly warned against curtailing Fourth Amendment liberties in order to make symbolic points in the War on Drugs:

> The Court's response to this lack of evidence is that "[t]here is little reason to believe that

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8 Indeed, as a recent GAO report documents, drug testing results of employees in test designated positions indicates that in all but one agency of the 18 which have initiated drug testing programs less than 0.7 percent of the employees tested were found to be positive for illegal drugs. The remaining agency administered 86 tests and had a 3.5 percent positive rate. GAO, "Employee Drug Testing: A Single Agency Is Needed to Manage Federal Employee Drug Testing" (GGD-91-25 Jan. 1991) at p. 17.

American workplaces are immune from [the] pervasive social problem" of drug abuse.... But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. . . .

. . . .

I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." . . . .I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

Von Raab, 489 U.S. 656, 684-87 (1989) (Scalia, J., dissenting).

In short, the decision of the court below goes far beyond *Von Raab* and threatens complete judicial abandonment of Federal employees' Fourth Amendment protections against unreasonable repeated mandatory random drug testing, so long as some connection with classified or confidential material can be alleged. The *per se* rule for holders of security clearances, first announced in *Harmon* and extended in this case is hurtling out of control, far from the governing principles of *Von Raab.* Indeed, it is clear that the reasoning of the court below, when applied to federal employees with confidential clearances and even those that simply have access to unclassified, but confidential, information, is likely to yield the same *per se* rule, ignoring the case-by-case balancing mandated by *Von Raab.* Thus, the federal government's most trusted employees become its most suspect, without cause or reason. This Court should act now to correct this situation.

II. The Government's Proffered Justification For Testing Employees With "Secret Clearances Was A Post-Hoc Rationalization And As Such Could Not Properly Be Considered By The Court Below.

As discussed in the Statement of Facts, the position advanced by the government below, that all employees with secret clearances can be subjected to mandatory random drug testing on that basis alone was wholly a

creation of agency litigation counsel. Indeed, as noted, the justification for testing two OA plaintiffs with "secret" clearances was in no way related to those clearances or to protection of information. Similarly, at USTR, where the entire agency is designated for testing, no effort was made to relate specific positions to specific testing justifications, nor was there any discussion of possession of a "secret" clearance as an *ipso facto* justification for testing. At OMB, where one-third of the agency is to be tested, those with "secret" clearances were discussed together with (and without distinction from) those holding "top secret" and other security clearances.

It is a well established principle of law that an agency's action must be upheld, if at all, on the basis articulated by the agency itself. *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983). This Court's decisions uniformly indicate that agency "litigating positions are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court." *Martin v. Occupational Safety and Health Review Commission*, 111 S. Ct. 1171, 1179 (U.S. Mar. 20, 1991); *see also Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988).

Here the Government's position is the baldest sort of post-hoc rationalization and is patently unsustainable on that ground alone. Indeed, the government did not even suggest the *per se* testing rule on which it prevailed below

until the *Harmon* decision was issued while this case was pending. The record fails to show any agency re-examination of the EOP plan prior to agency litigation counsel's embracing the *per se* rule for employees with "secret" clearances.

Especially in light of the important privacy rights involved, this post-hoc rationalization should not be allowed to stand.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

Of Counsel:
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Date: May 3, 1991

United States Court of Appeals

For the District of Columbia Circuit

No. 90-5050 September Term, 1990
CA 89-0044

Norman Hartness, et al.

v.

George Bush, President of the United States, et al.

Appellants

BEFORE: Mikva, Chief Judge; Edwards and Silberman, Circuit Judges

O R D E R

Upon consideration of appellees' petition for rehearing, filed December 28, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards would grant the Petition for Rehearing.

United States Court of Appeals

For the District of Columbia Circuit

No. 90-5050 September Term, 1990
CA 89-0044

Norman Hartness, et al.

v.

George Bush, President of the United States, et al.

Appellants

BEFORE: Mikva, Chief Judge; Wald, Edwards Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

ORDER

Appellees' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judge Edwards would grant the Petition for Rehearing.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 7, 1990 Decided November 16, 1990

No. 90-5050

NORMAN HARTNESS, ET AL.

v.

GEORGE BUSH, PRESIDENT OF THE UNITED STATES, ET AL.,
APPELLANTS

Appeal from the United States District Court
for the District of Columbia

(Civil Action No. 89-00044)

Lowell V. Sturgill, Jr., Attorney, Department of Justice, with whom *Stuart M. Gerson*, Assistant Attorney General, *Patricia M. Bryan*, Deputy Assistant Attorney General, *Jay B. Stephens*, United States Attorney, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Jeffrey F. Liss, with whom *Arthur B. Spitzer* and *Elizabeth Symonds* were on the brief, for appellees.

Before: MIKVA, EDWARDS, and SILBERMAN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Concurring Opinion filed by *Circuit Judge* MIKVA.

Dissenting Opinion filed by *Circuit Judge* EDWARDS.

SILBERMAN*Circuit Judge*: This appeal challenges a preliminary injunction that, as modified by the district court, forbids a number of agencies in the Executive Office of the President ("EOP") from conducting random urinalysis drug-testing of employees with "secret" national security clearances. We hold that the prior decisions of the Supreme Court and of this court establish the validity of random drug testing of such personnel and, therefore, reverse the district court's decision.

I.

In 1986, President Reagan promulgated Executive Order No. 12,564, the goal of which was to create a "drug-free Federal workplace." 51 Fed. Reg. 32,889 (Sept. 17, 1986). Pursuant to the order, in July 1988 the EOP issued its own Drug-Free Workplace Plan covering its constituent agencies. Each agency designates employees whose position requires random urinalysis testing. The actual procedures for choosing the individuals to be tested, obtaining urine specimens, and testing the specimens for drugs are substantially identical to the procedures this court upheld with respect to personnel holding "Top Secret" security clearances in *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990). These procedures "significantly minimize" intrusion on the employees' privacy expectations. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1394 n.2 (1989).

On May 19, 1989, the district court entered a prelimi-

nary injunction barring the government from random drug testing of plaintiffs in the top secret and secret categories.[1] After our decision in *Harmon*, the district court modified the injunction by excluding from its scope the personnel holding top secret clearances. The government now appeals the temporary injunction forbidding the testing of the personnel holding secret clearances.

II.

We are guided of course by those decisions of the Supreme Court and of this court that bear on the question. The framework of the analysis of challenges to drug testing is provided by *Von Raab* and *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989). *Von Raab* and *Skinner* establish the following propositions: urinalysis testing is a significant intrusion into the privacy interests of employees and as such is a search within the Fourth Amendment, *see Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1412-13, and it does not require a warrant, a probable cause, or any level of individualized suspicion, *see Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1416-17, but is instead governed by the balancing process weighing the interests of the government *qua* employer against the privacy interests of the employees, *see Von Raab*, 109 S. Ct. at 1390; *Skinner*, 109 S. Ct. at 1413-14. Those governmental interests powerful enough to justify urinalysis testing include the public security interests that can be endangered by employees with access

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[1]Pursuant to the Executive Order 12356, there are three levels of national security classification: top secret, secret and confidential. "Top Secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." *Id.* § 1.1(a)(1). "Secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." *Id.* § 1.1(a)(2). "Confidential" information is information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." *Id.* § 1.1(a)(3).

to national security information, *see Von Raab*, 109 S. Ct. at 1396-97, by personnel who carry firearms in the course of their employment, *see National Fed'n of Federal Employees v. Cheney*, 884 F.2d 603, 612-13 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990); by personnel with access to drugs or who prosecute drug cases, *see Harmon*, 878 F.2d at 490; and by employees who control or have access to dangerous instrumentalities, *see Cheney*, 884 F.2d at 610-11; *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 891-92 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990). All of these propositions are now part of settled Fourth Amendment law.

Von Raab further recognized that the government has a compelling interest in the discovery of drug use to protect "truly sensitive information." But the Court in that case used both the terms "sensitive" and "classified" in such a fashion as to suggest that it was unsure of the strength of the government's interest in protecting the information to which some of the employees involved—such as "animal caretaker[s]," "baggage clerk[s]," and "co-op student[s]"—had access. *Von Raab*, 109 S. Ct. at 1396-97. Indeed, it was not clear that those employees had security clearances of any kind.

Subsequently, in *Harmon* we were faced with the question of the strength of the government's interest in the protection of top secret information. The court (unanimous on this point) was unequivocal in its assessment of this interest: "[w]hatever 'truly sensitive' information includes, we agree that it encompasses top secret national security information." 878 F.2d at 491 (footnote omitted). We therefore held that a person with a top secret clearance generates sufficiently grave potential risk to national security to make the decision to conduct random urinalysis testing reasonable *regardless of any other attendant circumstances*. Appellees argue that *Harmon* short-circuited the *Von Raab/Skinner* balancing test by disregarding the employees' privacy interest and by not examining the degree of supervision to which the employees were subject. Just so—in any balancing test, certain factors may

be decisive whenever they are present. Implicitly, but necessarily, *Harmon* assumed that the degree of supervision of a holder of top secret clearance was irrelevant and that he or she had diminished privacy expectations. The government's primary concern with regard to material classified as top secret (or secret) is that an employee could be induced, perhaps by a blackmailer who is aware of employee's illegal drug use, to disclose the information. *See Department of Navy v. Egan*, 484 U.S. 518, 528 (1988). If an employee using illegal drugs has access to the information because of his clearance, the degree of his supervision presumably would not reduce the risk of disclosure. As for the privacy interest, a number of cases, besides *Harmon*, have recognized that holders of security clearances have less of an expectation of privacy. *See Von Raab*, 109 S. Ct. at 1397 (background investigations "may be expected to diminish [the employees'] expectations of privacy in respect of a urinalysis test"); *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989).

Harmon's insight that, at its peripheries, a balancing test may be presumed always to yield one result is hardly novel. The Supreme Court has preserved the overall balancing test of "reasonableness" required by the Fourth Amendment while articulating several *per se* rules of specialized application which automatically allow searches of pre-determined scope under specified circumstances. *See, e.g., United States v. Ross*, 456 U.S. 798 (1982) (all containers within an automobile are subject to a search if there is cause to search the automobile itself); *New York v. Belton*, 453 U.S. 454 (1981) (the entire inside area of the automobile can be presumed to be within the reach of the arrestee and is subject to a search incidental to a lawful arrest); *Chimel v. California*, 395 U.S. 752 (1969) (search incident to a lawful arrest may extend to any area "'within [arrestee's] immediate control,'" *id.* at 763). Indeed, a number of drug-testing cases in this court are premised on the assumption that the commands of *Von Raab* can be fulfilled by drawing clear demarcation lines. We consistently assumed that some jobs performed by the

federal employees create sufficiently grave risks as to make random drug testing reasonable in all circumstances. Thus, we did not place great weight on the precise type of weapons carried by the guards when we approved random urinalysis testing of them, *Cheney*, 884 F.2d at 612-13, and we did not base our decision that bus drivers can be tested on the precise number of people they transport, *AFGE*, 885 F.2d at 893.

Appellees argue, nevertheless, that the change of the threat from "exceptionally grave damage to national security" (top secret) to "serious damage to national security" (secret) is of constitutional magnitude and that we are, therefore, required to apply a different analysis than we did in *Harmon*—particularly because appellees imply that *Harmon* was itself a dubious interpretation of *Von Raab* and should not, therefore, be extended. We do not see, however, how the constitutional permissibility of drug testing can depend on whether the employees tested have access to information the disclosure of which causes "only" *serious* damage as opposed to *exceptionally grave* damage to national security. Nothing in Fourth Amendment jurisprudence suggests that a distinction of constitutional principle can be drawn between the two categories. That is why the dissent's effort to draw a constitutional "line in the sand" between top secret and secret (interpreting the word "reasonable" in the Fourth Amendment) seems so labored.[2]

And none of the claimed distinctions raised by appellees between this case and *Harmon* are determinative. The privacy interests of employees holding top secret and secret clearances are not significantly different: in both cases the employees know that their conduct on- and off-work is of significant concern to the federal government and that at periodic intervals the government will conduct further inquiries into their behavior and associations. *See*,

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[2]Even if we thought *Harmon* was in error in presuming the results of the balancing test, we are not free to reexamine its holding other than *en banc*.

e.g., 32 C.F.R. Part 154.19 (1989). The frequency of exposure to secret documents (or lack of it) is not crucial—in *Harmon*, this court held that for employees with the top secret clearances, random urinalysis tests are permissible regardless of the fact that some employees may be rarely, if ever, exposed to such materials. "The whole point of granting top secret security clearances in advance is to provide flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." *Harmon*, 878 F.2d at 492. Similarly, the closeness of supervision is non-dispositive in this context. *Harmon* rejected the argument that employees in a "traditional office environment" (one of the factors mentioned in *Von Raab*, 109 S. Ct. at 1397, as lessening the need for testing) are necessarily immune under the Fourth Amendment from random testing. *Harmon*, 878 F.2d at 492. We cannot imagine, for instance, the permissibility of testing a holder of a secret clearance turning on whether he normally worked next door to a supervisor or on the floor below.

* * * *

The order of the district court is reversed.

MIKVA, *Circuit Judge, concurring*: I agree with Judge Silberman that the district court's order must be reversed insofar as it enjoins random urinalysis drug-testing of employees in the Executive Office of the President who hold "secret" national security clearances. Using *Harmon v. Thornburgh* as a starting point, the difference between the government's interest in testing *secret* clearance-holders and its interest in testing *top secret* clearance-holders is not significant enough to tip the constitutional scales against testing. I do not think it necessary, however, to go beyond this narrow holding.

EDWARDS, *Circuit Judge*, dissenting: At issue in this case is the degree to which the Government must justify its decision to subject holders of secret security clearances to random urinalysis testing. The Government contends that relevant case law establishes a *per se* rule permitting the testing of secret clearance holders, relieving it of the obligation to justify such testing on a case-by-case basis. The District Court disagreed, enjoining testing of secret clearance holders pending trial, at which the Government would be required to justify its testing program as reasonable in light of attendant circumstances. In my view, the District Court correctly concluded that governing law does not allow random testing of employees with secret security clearances solely because of those clearances and regardless of surrounding circumstances. Therefore, I would affirm the District Court order.

I write separately not only because I disagree with the decision to reverse the District Court order, but also to express my growing concern about the degree to which individual rights and liberties appear to be falling victim to the Government's "War on Drugs." No one can seriously doubt that the goal of thwarting illegal drug use and trafficking is critically important. The question raised by this case and other cases like it, however, is not whether the Government's end is worthy, but whether the end can justify means that run contrary to first constitutional principles. In my view, the judiciary is bound to answer in the negative.

The Fourth Amendment is not some discretionary doctrine, subject to waiver for good cause. It is instead a constitutional command, and as such stands apart from and above contemporary expediencies. Faced regularly with the grim results of the illegal drug trade, the judiciary may well be tempted to offer aid to the Government in its War on Drugs. But no matter how pressing the perceived need, the judiciary is simply without authority to trim back the

Fourth Amendment. There is, and can be, no "drug exception" to the Fourth Amendment.[1]

I fear that with today's decision, we move closer to reshaping basic Fourth Amendment doctrine to accommodate the exigencies of the moment. The War on Drugs is not the first battle in which zealous warriors, frustrated by the limits of the law, have called for the abridgement or abolition of fundamental civil liberties. We have seen other wars and other constitutional casualties. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (sustaining a military order incarcerating and dispossessing all Americans of Japanese origin on the West Coast following Pearl Harbor during World War II).[2] And when the war is over, we find that departures from constitutional norms, legitimized by the courts, have lasting and wide-ranging effects. Constitutional principles, once abandoned, are not easily reclaimed.

We are asked today to announce a *per se* rule, permitting random drug testing of secret clearance holders in the absence of any factual showing by the Government that such testing will address a real problem or advance some

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[1]*See Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402, 1426 (1989) (Marshall, J., dissenting); Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (As Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986); Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987); *see also* Thompson, *Fourth Amendment Is Trampled in Drug Offensive, Critics Say; More Courts Upholding Random Searches*, Wash. Post, May 7, 1990, at 1, col. 1.

[2]*Korematsu* "represents the nefarious impact that war and racism can have on institutional integrity and cultural health." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978).

See also Dennis v. United States, 341 U.S. 494 (1951) (Cold War conviction for teaching of communist doctrine). The Court in *Dennis* distinguished between protected discussion and unprotected advocacy of revolutionary violence. *Dennis* was subsequently "reinterpreted" in *Yates v. United States*, 354 U.S. 298, 318-24 (1957), in which the Court distinguished between protected advocacy of doctrine and unprotected advocacy of action.

significant national security interest. Justice Scalia's dissent in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1399-1401 (1989) (Scalia, J., dissenting), in which the Court upheld suspicionless drug-testing of employees in the Customs Service applying for promotion to positions involving interdiction of illegal drugs, is on point here:

> The Court's opinion in the present case . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees. . . .
>
> The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. . . . But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. . . .
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> . . . .
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> . . . I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." . . . I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

I have no doubt that our approval of the Executive Office's urine testing program will allow the Government

to claim a symbolic victory in the War on Drugs. But victory purchased at the expense of individual rights is illusory; in the end, we will almost surely regret the price we pay. And even if we are now prepared, as a matter of policy, to trade rights for results, the Fourth Amendment prohibits us, as a matter of law, from making such a short-sighted sacrifice.

With these concerns in mind, I dissent from today's decision.

I. Background

The Executive Office of the President ("EOP") adopted a Drug-Free Workplace Plan in July 1988. The EOP drug testing program applies to the immediate White House Office and the Office of the Vice President, and to separate component agencies bearing a relationship to the work of the President. This case arises out of a suit filed by 30 employees of three government agencies: the Office of Management and Budget ("OMB"), the Office of Administration ("OA") and the United States Trade Representative ("USTR").

As part of a comprehensive urinalysis drug testing program, the EOP plan calls for random testing of employees holding specially designated, sensitive positions.[3] Among the criteria to be considered by agency heads in designating positions for random testing are whether a position requires a security clearance as a condition of employment and whether a position involves access to sensitive information. J.A. 102. It appears from the record that every position at OA and USTR and over one third of the positions at OMB are subject to testing under the EOP

[3]The EOP plan also authorizes applicant testing, testing on reasonable suspicion of drug use, voluntary testing, post-accident testing and testing as follow-up to rehabilitation or counseling. Joint Appendix ("J.A.") 82. All testing procedures are governed by Department of Health and Human Services Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (1988). *See* J.A 110.

program. *See* J.A. 229, 215-16, 208-12; *see also* Brief for Appellees at 4-5.

All 30 of the employees involved in this suit ("appellees") work in testing-designated positions. Nineteen hold "top secret" security clearances, 10 hold "secret" clearances, and one holds no security clearance. J.A. 316. The degree to which the appellees' positions involve actual access to sensitive material is not yet clear on the record, though a number of appellees aver that they never or only rarely view classified documents. *See* J.A. 226-28, 292-93. All of the appellees generally work in supervised, traditional office environments. J.A. 259.

In May 1989, the District Court entered a preliminary injunction barring the three EOP agencies in question from conducting random drug testing of the appellees. *Hartness v. Bush*, 712 F. Supp. 986 (D.D.C. 1989). The District Court judge concluded that, on the underdeveloped record before him, the Government was unlikely to show an interest sufficiently compelling to justify random testing, or to show that the criteria it used to select positions for testing was sufficiently precise. *Id.* at 993.

In January 1990, after intervening decisions by this court, the District Court vacated the preliminary injunction with respect to appellees holding top secret security clearances. *Hartness v. Bush*, Civ. Action No. 89-0044 (D.D.C. Jan. 26, 1990), *reprinted in* J.A. 316. The trial judge found that, under *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990), employees with top secret clearances may be subjected to random drug testing as a matter of law. The District Court refused, however, to vacate the injunction with respect to secret clearance holders, concluding that "[i]t is not at all clear in the present state of the controlling decisions that the government may test the urine of all employees solely because they possess secret security clearances irrespective of the circumstances . . . ." J.A. 318-19. To facilitate consideration of the relevant circumstances, the District Court deferred decision on the par-

ties' cross-motions for summary judgment and ordered discovery on the procedures and criteria used to select positions for testing. *See* J.A. 319-20.

On appeal, the Government challenges the District Court order insofar as it continues to enjoin the random testing of employees with secret clearances.

II. Analysis

A.

Our consideration of the EOP drug testing program is framed by certain well-settled propositions of Fourth Amendment law. The Fourth Amendment protects against "unreasonable searches and seizures" by all government authorities. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335 (1985). In normal circumstances, a search is "reasonable" under the Fourth Amendment only if supported by a warrant issued on probable cause. *See, e.g., Katz v. United States*, 389 U.S. 347, 356-57 (1967). Even in those limited and exceptional circumstances in which the warrant requirement is relaxed, probable cause generally remains the touchstone for determining the constitutionality of a full-scale search. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see also T.L.O.*, 469 U.S. at 340.

Excepted from this core probable cause requirement are minimally intrusive government actions that do not rise to the level of full-scale searches. Such actions may be valid where based on a level of individualized suspicion that falls short of probable cause. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 24-27 (1968) (upholding limited "stop-and-frisk" based on reasonable suspicion). However, excluding a narrow class of cases where routinized, nonintrusive encounters entail no contact with the person, some quantum of individualized suspicion is necessary to justify a search as "reasonable." *See United States v. Martinez-Fuerte*, 428 U.S. 543, 557-61 (1976) (individualized suspicion ordinarily required, but not where routine border

checkpoints entail searches of neither vehicles nor their occupants).

This basic framework has been modified in recent years with the introduction of a "special needs" exception to the warrant and probable cause requirement. When "special needs" beyond the normal need for law enforcement make the warrant and probable cause standard "impracticable," the Government may now conduct full-scale searches under a less demanding "reasonable under all the circumstances" standard. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987) (search of probationer's home by probation officer); *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (work-related search of employee's desk by government employer); *T.L.O.*, 469 U.S. at 341 (search of student's purse by school official). Without actually deciding whether individualized suspicion is a necessary precondition of "reasonableness under all the circumstances," the Supreme Court until 1989 sustained as "reasonable" under the special needs doctrine only searches that were in fact supported by individualized suspicion. *See Griffin*, 483 U.S. at 875; *Ortega*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 342 n.8.

The Supreme Court moved a step further from traditional Fourth Amendment standards when it upheld the constitutionality of government drug testing programs in *Skinner v. Railway Labor Executives Association*, 109 S. Ct. 1402 (1989), and *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989). The Court determined, first, that although government-compelled urinalysis tests constitute "searches," *Skinner*, 109 S. Ct. at 1413, they are excepted from the Fourth Amendment's warrant and probable cause requirement because they serve "special needs" beyond law enforcement, *id.* at 1414. Moreover, the Court concluded that such searches may be reasonable even in the absence of any individualized suspicion, *id.* at 1417; *Von Raab*, 109 S. Ct. at 1392, marking its first departure under the special needs doctrine from the fundamental Fourth Amendment mandate that government searches be based on some form of particularized suspi-

cion. Under the balancing test applied in *Skinner* and *Von Raab*, a drug test in the employment context is "reasonable" and therefore constitutional if, in light of all surrounding circumstances, the governmental interest it serves outweighs the intrusion on individual privacy interests it occasions. *Skinner*, 109 S. Ct. at 1414; *Von Raab*, 109 S. Ct. at 1392.

The question before us today is whether the EOP drug testing program will be held to this latest and most minimal Fourth Amendment "reasonableness" standard. The Government asks that we move one critical step further from the Fourth Amendment, excepting random testing of secret clearance holders from the *Skinner* and *Von Raab* balancing test as *per se* reasonable. I agree with the District Court that governing law does not permit us to take this final step.

B.

The Government argues, in essence, that its interest in protecting sensitive information is sufficiently weighty that it will justify random testing of employees with secret security clearances in all cases, regardless of surrounding circumstances. Or, as explained by Judge Silberman, the Fourth Amendment balancing test "may be presumed always to yield one result" when applied to testing of secret clearance holders. The magnitude of the governmental interest at stake renders irrelevant such contextual factors as the degree to which employees have actual access to sensitive materials and the amount of supervision to which they are subject on the job, and establishes the *per se* "reasonableness" of urinalysis testing.[4]

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[4]Under the EOP plan, testing procedures must accord with government-wide guidelines issued by the Department of Health and Human Services. I do not understand the Government, or either of my colleagues, to argue that drug testing of secret clearance holders would necessarily remain reasonable under the Fourth Amendment were the Government to adopt more intrusive testing procedures. The *per se* rule argued for and adopted today presumes the continued application of testing procedures designed to minimize the privacy intrusion occasioned by such testing.

In support of this position, the Government relies primarily on *Harmon v. Thornburgh*, 878 F.2d 484, 491-93 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990), in which this court upheld the drug testing of employees with *top secret* security clearances, regardless of whether the employees had regular access to secret materials and despite the fact that they worked in closely supervised, traditional office environments. The District Court in this case agreed with the Government that, under *Harmon*, EOP top secret clearance holders may be subject to random drug testing, and the appellees do not dispute this conclusion. Instead, the appellees challenge the extension of *Harmon* to EOP employees with *secret* security clearances, arguing that testing of such employees remains subject to the context-specific balancing test of *Von Raab* and *Skinner*.

Resolution of this issue begins with the Supreme Court's discussion in *Von Raab* of drug testing as a means of advancing the governmental interest in protecting sensitive information. Subsequent decisions by this court, applying and elaborating upon *Von Raab*, guide our analysis as well. Because those decisions must be read in context and accord with *Von Raab*, however, *Von Raab* is the proper starting point for consideration of this case.

In relevant part, *Von Raab* involved a United States Customs Service drug screening program mandating urinalysis testing of applicants for positions requiring the handling of classified material. The Court "readily agree[d] that the Government has a compelling interest in protecting truly sensitive information." 109 S. Ct. at 1396 (citing *Department of the Navy v. Egan*, 484 U.S. 518 (1988) (denial of clearance to nuclear submarine facility employee)).[5] At the same time, however, the Court was

[5]Specifically, *Egan* upheld the denial of a security clearance that would have allowed access to information classified secret and confidential at a nuclear submarine facility. 484 U.S. at 521 & n.1. The Government reads *Von Raab*'s citation to *Egan* as evidence that the compelling governmental interest in protecting "truly

unable to uphold the reasonableness of the Customs Service program on the record before it, which did not make evident that all tested positions involved likely access to sensitive information. Instead, the Court remanded to the court of appeals for fact-specific application of the Fourth Amendment balancing test, instructing the court to examine

> the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

Id. at 1397.

Von Raab's case-by-case, highly contextual approach to weighing the national security interests advanced by particular drug testing programs is the antithesis of the bright-line rule urged by the Government today. *Von Raab* does not recognize a compelling governmental interest in protecting material at all levels of classification, but only in protecting material that is "truly sensitive." Central to a testing program's reasonableness under *Von Raab* are both the probability that tested employees will gain actual access to sensitive material and the degree to which they are already supervised on the job — precisely the factors that the Government claims are irrelevant to evaluation of the EOP testing program in question today. Essentially, *Von Raab* rejects a *per se* rule allowing testing of

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sensitive" information extends beyond top secret information to secret and confidential information, as well. My reading of the cases is different. *Von Raab*'s citation to *Egan* refers not to the particular security clearance at issue in that case, but to the extremely sensitive nature of the information accessible at a nuclear submarine facility. Like the trial court in this case, *see* 712 F. Supp. at 991-92, and the circuit court in *Harmon*, *see* 878 F.2d at 492, I read the *Egan* citation as evidence of the very high order of sensitivity contemplated by the *Von Raab* Court.

employees who may gain access to classified material, and instead demands that the Government justify such testing in each case as reasonable in light of all attendant circumstances under the Fourth Amendment balancing test.

Harmon v. Thornburgh excuses the Government from making this case-specific showing with respect to employees holding top secret clearances. Because "top secret national security materials lie at [the] very core" of the "truly sensitive" information in which the Government has a compelling interest, the court determined, Department of Justice attorneys holding top secret clearances may be tested whether or not they have regular access to top secret information and despite the fact that they work in supervised office environments where, presumably, drug use is detectable by less intrusive means. 878 F.2d at 491-92. On the basis of *Harmon*, the District Court concluded, and the appellees do not dispute, that testing of EOP top secret clearance holders may proceed without a predicate inquiry into all surrounding circumstances.

I have serious doubts whether *Harmon*'s categorical approach can be reconciled with *Von Raab*'s insistence on a fact-specific weighing of interests. In my view, *Von Raab* simply does not permit us to eviscerate the Fourth Amendment balancing test by "presuming" its outcome in advance. But even if the *Harmon* exception to *Von Raab* is defensible, it certainly is not so constitutionally secure that we should expand it beyond its intended scope to reach the testing of secret clearance holders.

By its own terms, *Harmon*'s *per se* rule is limited to top secret clearance holders. Indeed, the court in *Harmon* explicitly declined to extend its rule to all employees with access to confidential information, observing that the Supreme Court in *Von Raab* "gave indications that caution should be used in approving [the sensitive information] justification for testing." 878 F.2d at 492. Read, as it must be, to accord most fully with *Von Raab*, *Harmon* admits of one narrow interpretation only: except where the material in question is top secret and hence implicates

a "core" governmental national security interest, drug testing programs designed to protect sensitive information are subject to *Von Raab*'s factual inquiry into all surrounding circumstances. The basis on which top secret is distinguished from other classified material is no longer before the court; however sound the distinction, *Harmon* made it law when it carved out from the Fourth Amendment balancing test a special exception for top secret information alone.

That the *Harmon* exception is so limited is made clear by this court's decision in *American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990) ("*AFGE*"). *AFGE* sustained as reasonable the random testing of Department of Transportation ("DOT") mail van drivers with secret as well as top secret security clearances only after conducting a fact-specific inquiry under the *Von Raab* balancing test. The governmental interest in protecting classified materials in DOT mail vans outweighs the privacy interests of DOT drivers not automatically or categorically, but in part because the drivers have regular access to the materials and in part because they operate with little supervision outside an office environment, making detection of drug use through means other than urinalysis testing more difficult. *See* 885 F.2d at 892-93. Had *Harmon* established the *per se* permissibility of testing secret clearance holders, the court in *AFGE* could have dispensed with its contextual analysis. But because the *Harmon* exception applies only to top secret clearances, the *AFGE* court properly subjected testing of drivers with secret clearances to the case-specific assessment mandated by *Von Raab*.

AFGE's adherence to the *Von Raab* case-by-case balancing approach is to be expected; this court is, after all, bound by the Supreme Court's decision in *Von Raab*. And contrary to Judge Silberman's assertion, we have never believed that *Von Raab*'s directive can be satisfied by application of bright-line rules and "clear demarcation lines." As *Harmon* itself recognizes, *Von Raab* provides no

"analytical rule by which legitimate drug-testing programs [can] be distinguished from illegitimate ones" that might substitute for performance of a multifactor balancing test. *See* 878 F.2d at 488. Further evidence of this court's commitment to the *Von Raab* balancing test is provided by *National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990), in which the court refused to sustain on an insufficiently detailed record the random testing of Army civilian employees occupying chemical and nuclear surety positions. Despite the fact that the Army averred serious safety and national security interests in urinalysis testing, the court in *Cheney* found itself unable to assess the reasonableness of such testing on the record before it and remanded in accordance with *Von Raab*. 884 F.2d at 611-12.

The majority today departs from circuit precedent as well as from *Von Raab* when it creates a new exception to the Fourth Amendment balancing test for drug testing of secret clearance holders. And while Judge Mikva's concurring opinion explicitly limits today's holding to cases involving secret information, the reasoning offered by Judge Silberman admits of more expansive application. If *Harmon*, by its own terms limited to top secret clearance holders, can be read to establish the *per se* reasonableness of testing secret clearance holders, then it can be read to establish the reasonableness of testing confidential clearance holders, as well. Indeed, it is not self-evident that the reach of Judge Silberman's analysis stops short of federal employees with access to information unclassified but deemed "important" by the Government. Once expanded beyond its intended scope, the *Harmon* exception threatens to swallow the *Von Raab* rule, itself an exception to the constitutional mandate that searches be based on individualized suspicion, and render the Fourth Amendment essentially inapplicable whenever the Government invokes an interest in sensitive material to justify a drug testing regime.

Governing law does not permit such a result. Because *Harmon*'s *per se* rule does not extend beyond top secret

clearance holders, the testing of EOP secret clearance holders is reasonable under the Fourth Amendment only if it satisfies *Von Raab*'s context-specific balancing test. Therefore, I would affirm the District Court order enjoining preliminarily the random testing of EOP employees with secret clearances. Whether the Government can justify such testing as reasonable under all the circumstances should be determined by the District Court on a full factual record.

III. Conclusion

This case is not the first Fourth Amendment casualty claimed by the War on Drugs. Nor, in all likelihood, will it be the last. We have dispensed already with the warrant and probable cause requirement in furtherance of the War on Drugs; indeed, in some cases, the Government has been allowed to conduct drug tests of its employees without any showing of individualized suspicion. And today, with respect to an entire class of federal employees, we relieve the Government of its obligation to justify testing as reasonable in light of all attendant circumstances. Even with no "real evidence of a real problem that will be solved by urine testing," *Von Raab*, 109 S. Ct. at 1399 (Scalia, J., dissenting), this minimal Fourth Amendment standard is dismissed as expendable in the heat of battle. As Justice Scalia said, "the Fourth Amendment has become frail protection indeed." *Id.* at 1400.

Times of crisis take the truest measure of our commitment to constitutional values. Constitutional rights are only as strong as our willingness to reaffirm them when they seem most costly to bear. I fear that today's decision finds us unwilling to do what we must to preserve fundamental Fourth Amendment freedoms. Respectfully, I dissent.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NORMAN HARTNESS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 89-0044-
v.	)	LFO
	)	
GEORGE BUSH, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 89-0950-
	)	LFO
RICHARD AUSTIN, Administrator, General Services Administration,	)	
	)	
Defendant.	)	

THE HON. VINCENT A. LABELLA, *et al.*,	)	
Plaintiffs,	)	
	)	Civil Action No. 89-1152-LFO
v.	)	
RICHARD AUSTIN, Administrator, General Services Administration,	)	
Defendants.	)	

MEMORANDUM

I.

Various civilian employees of the federal government and a labor union have sued to enjoin government testing of employees' urine now scheduled to begin on or after May 24, 1989. Three cases brought by or on behalf of employees in the Executive Office of the President ("EOP"), *Hartness v. Bush*, and in the General Services Administration ("GSA"), *AFGE v. Austin* and *LaBella v. Austin*, are now before the Court on motions for preliminary injunction pending a decision on the merits.

The defendants in these cases adopted the plans at issue in obedience to Executive Order No. 12,564 issued September 15, 1986. The preamble to the Order noted the

serious adverse effects of drug use upon the national work force, the resulting loss of productivity, the federal government's concern for the well-being of its employees, its concern for successful accomplishment of agency missions, and the need to maintain employee productivity. In addition, the Order stated that:

> The federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to afford drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace.[1]

There was also reference to public safety, effective law enforcement, crime and violence generated by commerce in illegal drugs, and the deleterious effect of drugs on federal employees' reliability and good judgment that is inconsistent with access to sensitive information and creates the possibility of irresponsible action posing a serious risk to national security. For these reasons, the Executive Order barred drug use by federal employees on duty and off duty and charged each agency with responsibility for developing a plan for achieving "the objective of a drug-free workplace with due consideration

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1 Executive Order 12,564, Exhibit 14 to Appendix to Statement of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction in *Hartness v. Bush* at 1.

of the rights of the government, the employee, and the general public."[2]

More specifically, for purposes of the pending motion, the Executive Order directed each agency to "establish a program to test for the use of illegal drugs by employees in sensitive positions."[3] In addition, it authorized the testing of an employee "[w]hen there is a reasonable suspicion that [the] employee uses illegal drugs."[4]

Pursuant to that Order, the EOP plan authorizes random testing of all employees in designated "sensitive positions," including personnel at the Office of Management and Budget, the Office of the United States Trade Representative, and the Office of Administration. With respect to the 30 named plaintiffs in *Hartness v. Bush*, none of these EOP personnel has a White House pass.[5]

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2 *Id.* at Section 2(a).

3 *Id.* at Section 3(a).

4 *Id.* at Section 3(c)(1).

5 Plaintiffs' Proposed Findings of Fact and Conclusions of Law in *Hartness v. Bush* at 9; Defendants' Proposed Findings of Fact and Conclusions of Law in *Hartness v. Bush* at 14.

A White House pass, issued by the Secret Service, permits access to the entire White House Complex, including the East and West Wings of the White House. The two other

Furthermore, there is no indication in the record that any of the named plaintiffs would have unguarded access to the President or the Vice President. All of them are subjected to thorough security checks by the Federal Bureau of Investigation before they are appointed. All involved in this case generally operate under close supervision in a conventional government office environment.

The record in *Hartness v. Bush* reveals that there were reported to be five drug abuse problems involving an EOP employee in the last 40 months.[6] There is no evidence in the record that there has ever been a case of bribery, any compromise of classified documents or other national security information, or any other serious misbehavior by any EOP employee. Nor is there any evidence of any accident, serious or otherwise, for which an EOP employee

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[Footnote 5 continued from previous page]
kinds of passes issued by the Secret Service, the Old Executive Office Building ("OEOB") Pass and the New Executive Office Building ("NEOB") Pass, do not permit access to the Executive Mansion, including the East and West Wings, but only permit access to the OEOB, the NEOB, and the Winder Building. Declaration of Charles Easley, Exhibit B to Defendants' Memorandum in Opposition to a Preliminary Injunction in *Hartness v. Bush* at 3-4.

6 Defendants' Responses to Plaintiffs' Interrogatories and Requests for Production of Documents in *Hartness v. Bush*, filed May 8, 1989.

has been held responsible. Affidavits filed by a sampling of 8 EOP plaintiffs indicate that none has a security clearance that would enable him or her access to information related to sensitive military secrets or plans, or strategic national security issues.[7]

The GSA plan authorizes random testing of employees in designated sensitive and safety-related positions. The plan defines employees in sensitive positions to include positions defined as sensitive under Chapter 731 of the Federal Personnel Manual, an employee granted or who may be granted access to classified information, presidential appointees, law enforcement officers, and "other positions that involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence."[8] However, counsel for defendants in the *AFGE v. Austin* case represented at oral argument on the pending motion that GSA intends to defer testing of certain designated positions, including elevator mechanics, automotive workers, and fire protection engineers. GSA employees in non-deferred

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7 Supplemental Exhibits to Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction in *Hartness v. Bush*, filed May 12, 1989.

8 General Services Administration Plan to Implement Executive Plan 12,564, Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction in *AFGE v. Austin* at 5-6.

testing designated positions are Physical Security Specialists, Federal Protective Officers, Police Officers, Detectives, Protection Specialists, Security Guards, Training Instructors, Communication Equipment Operators, Firefighters, and Motor Vehicle Operators. At oral argument counsel for GSA conceded that although the police officers designated for urine testing carry weapons, they are seldom used, and there is no record of their being misused. Moreover, police are routinely inspected and instructed by supervisors at daily roll calls.

Testing designated positions challenged by the three named plaintiffs in the *LaBella v. Austin* case are Presidential Appointees/senior level managerial positions/Administrative Judges, Criminal Investigators, Personnel Security Specialists and Security Specialists, Employee and Labor Relations Specialists, Civil Engineer/Construction Representative, National Security Emergency Preparedness Staff/Information Security Division, and Office of Information Security Oversight.[9]

With respect to drug testing at the GSA, according to a GSA Order issued September 9, 1988, "the overwhelming majority of GSA employees have never had trouble with illegal drugs."[10] There is no evidence in the

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9 Defendants' Proposed Findings of Fact and Conclusions of Law in *LaBella v. Austin* at 7-10.

10 Exhibit B to Exhibits to the Memorandum of Points and Authorities in Support of Plaintiffs' Application for a

record that GSA made any systematic study of drug use or its consequences. GSA has approximately 20,000 employees. According to a declaration by the official responsible for implementation of the GSA drug control plan, while the absence of systematic urine testing has limited the information about employee drug abuse, he was able to list only twenty-two cases over a five-year period in which GSA has taken disciplinary and performance based actions relating to drug use."[11] In only three of these cases had the employee been arrested or convicted of a drug related crime. There is no indication that GSA has brought any of the twenty-two cases or any other case of drug abuse by a GSA employee to the attention of law enforcement officials. Furthermore, there was no report of a drug related accident or that accidents were a serious

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Preliminary Injunction in *LaBella v. Austin* at 1.

11 The employees involved included a motor vehicle operator (who resigned), an insulator, a painter, a program clerk, a contract administrator, an accounting technician, a high voltage electrician, a physical security specialist, a warehouse worker, two federal protective officers, an automotive equipment repair inspector, a secretary and realty assistant, two clerk typists, a custodial worker, a procurement clerk, an air conditioning equipment mechanic, a position classification specialist, a financial management specialist, a staff assistant, and a management assistant. Declaration of Paul T. Weiss, Exhibit D to Memorandum of Points and Authorities in Support of Plaintiffs' Application for a Preliminary Injunction in *AFGE v. Austin* at ¶ 19.

GSA employee problem. Nor was there any reported case of drug related bribery. Moreover, there is no evidence in the record that GSA's mission is in any way connected to drug interdiction, or that anyone at GSA is personally involved in the interdiction of illegal drugs.

The GSA plan also authorizes reasonable suspicion testing of any employee suspected of using illegal drugs on duty or off duty. The plan identifies a non-inclusive list of factors upon which reasonable suspicion of illegal drug use may be based: (1) observable phenomena, such as direct observation of drug use or possession and/or the physical symptoms of being under the influence of a drug; (2) a pattern of abnormal conduct or erratic behavior; (3) arrest or conviction for a drug-related offense, or the identification of an employee as the focus of a criminal investigation into illegal drug possession, use, or trafficking; (4) information provided either by reliable and credible sources or independently corroborated; or (5) newly discovered evidence that the employee has tampered with a previous drug test.[12]

Initial responsibility for determining reasonable suspicion rests with supervisors, who are charged with gathering all information, facts and circumstances leading to and supporting their suspicion, and who must then obtain the concurrence of the next level supervisor in making the finding that a reasonable suspicion of illegal drug use

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12 *See supra* note 8 at 25.

exists. An appropriate supervisor will then promptly prepare a written record detailing the circumstances that formed the basis for the determination of reasonable suspicion, including the dates and times of reported drug related incidents, reliable sources of information, the rationale leading to the test, findings of the test, and the action taken. The GSA plan also provides that supervisors will be trained to address illegal drug use by employees, to recognize facts that give rise to a reasonable suspicion, and to document facts and circumstances to support a finding of reasonable suspicion. Failure to receive such training, however, "shall not invalidate otherwise proper reasonable suspicion testing."[13]

It is estimated that the GSA plan will subject approximately 2,360 GSA employees to random testing.[14] All 20,000 GSA employees are at risk of being tested if GSA has what it describes as a reasonable suspicion of drug use by the employees.

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13 *Id.* at 26.

14 Defendants represent that because GSA has voluntarily delayed random testing of some categories of testing designated positions, including General Supply Officers/Supply System Analyst of the Automotive, Furniture, Office and Scientific Equipment and Tools Commodity Centers, fewer employees are subject to immediate testing. Declaration of Paul T. Weiss, *supra* note 11 at ¶¶ 8, 12; representation by counsel for defendants in *LaBella v. Austin* during oral argument.

II.

In the time since the Executive Order was issued and the agency plans adopted, there have been significant Fourth Amendment jurisprudence developments applicable to these cases. Several judges on this District Court have enjoined implementation of agency plans adopted in response to the Executive Order, including plans issued by the Department of Justice, the Department of the Army, the Department of the Interior, and the Department of Agriculture, and in two cases judges have denied preliminary injunction applications by air traffic controllers and other Department of Transportation employees, and by members of the Uniformed Division of the United States Secret Service; three of these cases have been briefed and argued and are awaiting decisions in our Court of Appeals.[15] More important, since these

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15 *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988), *appeal docketed*, No. 88-5265 (D.C. Cir. Aug. 11, 1988); *National Federation of Federal Employees v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988), *appeal docketed*, No. 88-5080 (D.C. Cir. Mar. 16, 1988); *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987), *appeal docketed*, No. 87-5417 (D.C. Cir. Dec. 11, 1987); *Bangert v. Hodel*, No. 88-3549 (D.D.C. Jan. 30, 1989) (Greene, J.); *Uniformed Division Officers Ass'n v. Brady*, No. 88-3377 (D.D.C. Dec. 23, 1988) (Flannery, J.); *National Treasury Employees Union v. Lyng*, Nos. 88-2515 and 88-2668 (D.D.C. Dec. 8, 1988) (Flannery, J.); *National Federation of Federal Employees v. Carlucci*, 690 F. Supp. 46 (D.D.C. 1988).

plans now at issue were adopted, the Supreme Court has announced its decisions in *Skinner v. Railway Labor Executives Association*, 109 S. Ct. 1402 (1989), and *National Treasury Employees v. Von Raab*, 109 S. Ct. 1384 (1989), and has remanded for reconsideration by our Court of Appeals its decision approving the urine testing of District of Columbia school bus attendants in the course of required annual medical examinations.[16]

Skinner and *Von Raab* tend to confirm the earlier decisions by judges of this Court that several plans for random urine testing of government employees are impermissibly broad and imprecise. Yet, except for a temporary litigation concession by GSA, neither defendant in the cases now before this Court has adjusted its testing plan to reflect any realistic response to what appears to be a clear message from the Supreme Court.

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16 *Jones v. McKenzie*, 628 F. Supp. 1500 (D.D.C. 1986), 833 F.2d 335 (D.C. Cir. 1987), *vacated and remanded sub nom. Jenkins v. Jones*, 57 U.S.L.W. 3653 (April 4, 1989). The record there included evidence of "repeated incidents of bizarre or drug-related behavior by drivers or attendants while on duty; syringes and bloody needles found in restrooms used by Transportation Branch employees; and [an estimation by] the head of the Branch 'that 60% of the employees assigned to the Transportation Branch are using narcotics to some extent.'" 833 F.2d at 336 (citations omitted). Pending its reconsideration, the Court of Appeals has ordered counsel to file supplemental briefs.

In *Skinner*, a divided court held that "surpassing safety interests" justified mandatory, after-accident testing of railroad crews.[17] The Federal Railroad Administration found that "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor" and that these accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million."[18] The agency further identified "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor."[19] The level of the "safety interests" that justifies exposing a person to the indignity of a urine test may be measured by the Supreme Court's approving quotation of the dissenter below, who wrote:

> An idle locomotive, sitting in the roundhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs.[20]

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17 *Skinner*, 109 S. Ct. at 1422.

18 *Id.* at 1407-08.

19 *Id.* at 1408.

20 *Id.* at 1419.

The five to four decision in Von Raab approved the testing of armed Customs Service officers engaged in front-line drug interdiction who were applicants for promotion and who could protect themselves from testing by the simple expedient of declining promotion. The Court there reasoned that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment,"[21] and that "Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty . . . have a diminished expectation of privacy."[22] The Court drew a clear distinction between these employees and "most private citizens or government employees in general."[23] Nevertheless, the *Von Raab* opinion concluded that "the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions which require the incumbent to carry a firearm, is reasonable."[24]

Moreover, while *Skinner* and *Von Raab* abandoned any requirement for particularized, individualized suspicion as a predicate for random testing, the fact bound opinions

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21 *Von Raab*, 109 S. Ct. at 1393.

22 *Id.* at 1394.

23 *Id.*

24 *Id.* at 1397.

require substantial *generalized* suspicion. The Supreme Court placed heavy emphasis in *Skinner* on the many drug related railway accidents shown on the record as justification for the narrowly focussed testing plan authorized there, and in *Von Raab* on the front-line drug interdiction mission of armed Customs Service officers directly confronted with the risk of bribery attempts and violence in the course of their daily work and who functioned so aggressively against drug traffickers as to have seized several billion dollars of drugs each year.

The narrow scope of the license granted to the government to engage in large scale urine testing is evidenced by the Supreme Court's skepticism about the breadth of the Customs Service testing program applicable to Customs employees required to handle classified material. The Court questioned "whether the [Customs] Service has defined this category of employees more broadly than necessary to meet the purposes of the Commissioner's directive."[25] The level of compelling national security interest contemplated by the *Von Raab* court as a requisite for limiting access to certain classified material to urine-tested employees may be perceived by reference to the cases that the Court chose to cite. In support of its recognition that "the Government has a compelling interest in protecting *truly sensitive information* from those who, 'under compulsion of circumstances or for

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25 *Id.*

other reasons, . . . might compromise [such] information,'"[26] the majority cited *Department of the Navy v. Egan*, 108 S. Ct. 818, 824 (1988) (Blackmun, J.). In the *Egan* case, the Court ruled, over the dissents of Justices White, Brennan and Marshall, that the Merit Systems Protection Board lacked authority to review the merits of a decision of the Navy that refused security clearance to a civilian employee at the Trident Naval Refit Facility in Bremerton, Washington. Justice Blackmun's opinion for the majority noted:

> The mission of the Refit Facility is to provide quick-turn-around repair, replenishment, and systems check-out of the Trident submarine over its extended operating cycle. The Trident is nuclear-powered and carries nuclear weapons. It has been described as the most sophisticated and sensitive weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system. . . . As a consequence, all employee positions at the Refit Facility are classified as sensitive."[27]

The Director of the Naval Civilian Personnel Command withdrew Egan's security clearance to work on the Trident as a machinist. According to Justice Blackmun:

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26 *Id.* at 1396 (emphasis added).

27 *Egan*, 108 S. Ct. 818, 820 (1988).

> This was based upon California and Washington state criminal records reflecting respondent's convictions for assault and for being a felon in possession of a gun, and further based upon his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. The Navy also referred to respondent's own statements that he had had drinking problems in the past and had served the final 28 days of a sentence in an alcohol rehabilitation program.[28]

In defining the task of the lower courts on the remand of *Von Raab*, the Supreme Court also cited *United States v. Robel*, 389 U.S. 258 (1967). In that case, Chief Justice Warren held unconstitutional a section of the Subversive Activities Control Act of 1950[29] making it unlawful for a member of the Communist-action organization to work in any defense facility. The plaintiff in that case was a member of the Communist Party employed as a machinist at the Todd Shipyards Corporation in Seattle, Washington. While as quoted in *Von Raab*, the Robel Court "recognized that . . . the Constitution . . . does not withdraw from the Government the power to safeguard its vital interests,"[30]

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28 *Id.* at 821.

29 § 5(a)(1)(D), 50 U.S.C. § 784(a)(1)(D).

30 *Von Raab*, 109 S. Ct. at 1396.

the law in question was fatally overbroad because it sought to

> bar employment both for association which may be proscribed and for association whim may not be proscribed consistently with First Amendment rights.[31]

Said Chief Justice Warren,

> For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.[32]

My reading of these cases persuades me that the Von Raab majority, which includes Justices Blackmun and O'Connor, but not Justice Scalia, would disapprove of the mandatory random testing of the urine of the broad range of unarmed employees now slated for testing by the GSA and the EOP. Evidence in the record with respect to the

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31 *Robel*, 389 U.S. 258, 266 (1967).

32 *Id.* at 264.

named plaintiffs in the *Hartness v. Bush* case and the eleven categories of GSA employees now scheduled for testing in the *LaBella v. Austin* case is inadequate to support the reasonableness of the search there at issue. With respect to the testing at issue in *AFGE v. Austin*, it may be that most, if not all, of the GSA employees who carry firearms in the line of duty do not and will not use them, and that when their several roles can be spelled out in consideration of the merits, testing will be found to be overkill. But a misused firearm, like a misused locomotive, can be lethal. At this stage of this proceeding, with regard to the management of firearms it is better to be safe than sorry. As to reasonable suspicion testing, the decision of other judges in this Circuit who have upheld reasonable suspicion testing but have decided that it must be conducted under circumstances exhibiting individualized suspicion of on the job impairment and with evidence of substantial reliability is entitled to great respect.[33] However, there is no showing here of imminent danger that would justify commencement of reasonable suspicion testing pending a decision on the merits, at least until the GSA plan is revised to provide that such testing is based upon reasonable, articulable, and individualized suspicion of use of drugs on duty or off duty, causing a reasonable

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33 *See Bangert v. Hodel*, No. 88-3549 (D.D.C. Jan. 30, 1989) (Greene, J.); *National Treasury Employees Union v. Lyng*, Nos. 88-2515 and 88-2668 (D.D.C. Dec. 8, 1988) (Flannery, J.).

suspicion that a specific employee may be under the influence of drugs while on duty.

Plaintiffs in the *Hartness v. Bush* case raise the additional point that the EOP plan indirectly violates the Administrative Procedures Act ("APA") because it explicitly relies on the Office of Personnel Management Federal Personnel Manual Letter 792-16 (Nov. 28, 1986) ("FPM Letter") as guidance, a Letter which itself is invalid because it was issued without notice and comment, in violation of the APA.[34] The EOP plan and the GSA plan explicitly state that they use the FPM Letter as guidance.[35] Although the issue of the APA was raised by the Court and was briefed by counsel in the *Hartness v. Bush* case only after oral argument, this issue nevertheless presents an additional ground on which plaintiffs may prevail on the merits.

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34 Plaintiffs' Supplemental Brief Regarding Application of the Administrative Procedure Act Rulemaking Requirements to the EOP Plan in *Hartness v. Bush* at 2-3, citing *National Treasury Employees Union v. Reagan*, 685 F. Supp. 1346, 1355-56 (E.D. La. 1988), *appeal docketed*, No. 88-3770 (Oct. 27, 1988).

35 Executive Office of the President Drug-Free Workplace Plan, Exhibit 15 to Plaintiffs' Appendix to Statement of Points and Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction in *Hartness v. Bush* at 4; General Services Administration Plan to Implement Executive Plan 12,564, *supra* note 8 at 4.

In any event, applying the traditional standards for issuance of a preliminary injunction set forth in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), and *Population Institute v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986), I am not persuaded on this record that the government will prevail on the merits of its claim that it has a compelling interest in the testing of the several hundred employees, including or potentially represented by plaintiffs, that justifies violation of their undisputed expectations of privacy with respect to their elimination functions. These employees, individually and collectively, may be presumed to be civilized men and women, no one of whom should be subjected to supervised elimination on a record such as this. Nor has the government demonstrated how postponement of commencement of testing of these plaintiffs, at least until their counsel and the Court has the benefit of our Court of Appeals' hopefully imminent rulings on the closely related decisions of other judges of this Court, will harm or injure the defendants or the public interest that they represent. There is a plain public interest in the protection of the Fourth Amendment privacy interest of each of the employees who might be tested now only to find that Supreme Court and Court of Appeals' decisions would have precluded the intrusion if the testers had had the benefit of them.

Accordingly, until these cases can be decided on the merits, an accompanying order will enjoin implementation of the mandatory random testing of the named plaintiffs in the *Hartness v. Bush* case, the eleven categories of GSA

employees now scheduled for testing in the *LaBella v. Austin* case, and unarmed employees occupying non-deferred testing designated positions in the *AFGE v. Austin* case, and wil l enjoin reasonable suspicion drug

testing of any GSA employee, unless or until the GSA drug testing plan is revised as provided therein.

Date: May 19, 1989

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NORMAN HARTNESS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 89-0040-LFO
v.	)	
	)	
GEORGE BUSH, *et al.*,	)	
	)	
Defendants.	)	
	)	
	)	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 89-0950-LFO
	)	
RICHARD AUSTIN, Administrator, General Services Administration,	)	
	)	
Defendant.	)	
	)	

THE HON. VINCENT A. LABELLA, *et al.*,	)	
Plaintiffs,	)	
	)	Civil Action No. 89-1152-LFO
v.	)	
RICHARD AUSTIN, Administrator, General Services Administration,	)	
Defendants.	)	

ORDER

It is likely that there will be a declaration on the merits in *Hartness v. Bush,* No. 89-0044, and *LaBella v. Austin*, No. 89-1152, that there is no national security or public safety interest in the testing of the named plaintiffs in *Hartness* or of the eleven categories of General Services Administration employees now scheduled for random drug testing sufficient to overcome the universal and obvious privacy expectations of those persons. It is also likely that there will be a declaration on the merits in those cases that the criteria used by defendants to select those persons for testing do not identify with sufficient precision the government's "vital interests" that would be protected by testing them or the extent, if any, that the proposed testing would enhance the safeguarding of any vital interests over

that now accomplished by existing security procedures and continuing supervision. However, the Supreme Court's holding in *National Treasury Employees' Union v. Von Raab*, 109 S. Ct 1384, 1396-97 (1989), regarding "the suspicionless testing of employees who apply for promotion . . . to positions which require the incumbent to carry a firearm" will likely lead to a declaration in *AFGE v. Austin*, No. 89-0950, that it is not unreasonable for the defendants to subject to random testing any incumbent employee required to carry a firearm in the course of his or her duty. The risk of firearm abuse is omnipresent, and the privacy expectation of those plaintiffs who carry firearms in the line of duty is relatively attenuated.

Finally, as explained by Judge Flannery in National *Treasury Employees Union v. Lyng*, Nos. 88-2515 and 88-2668 (Dec. 8, 1988), and Judge Greene in *Bangert v. Hodel*, No. 88-3549 (Jan. 30, 1989), the absence of any reasonable suspicion of work related drug use or impairment will probably result in a declaration on the merits that the reasonable suspicion element of the GSA plan cannot pass constitutional muster, unless and until it is revised as provided herein.

Accordingly, for the foregoing reasons and for reasons stated in the accompanying Memorandum, and upon consideration of plaintiffs' motions for preliminary injunction, the memoranda and exhibits submitted in support thereof and in opposition thereto, supplemental briefings, and extensive oral arguments on May 11 and

May 12, 1989, (a transcript of which will be filed), it is this 19th of May, 1989, hereby

ORDERED: that the motions for preliminary injunction in *Hartness v. Bush*, No. 89-0044, and *LaBella v. Austin*, No.89-1152, are hereby granted; and it is further

ORDERED: that the motion for preliminary injunction in *AFGE v. Austin*, No. 89-0950, is hereby granted in part and denied in part; and it is further

ORDERED: that, pending a decision on the merits, defendants in *Hartness v. Bush* are hereby enjoined from conducting the proposed random testing of the named plaintiffs who do not hold or acquire a White House pass, as defined in the accompanying Memorandum at footnote 5; and it is further

ORDERED: that, pending a decision on the merits, defendants in *AFGE v. Austin* and *LaBella v. Austin* [hereinafter GSA defendants] are hereby enjoined from conducting the proposed random testing of all persons represented by plaintiffs in *AFGE* who are now scheduled for testing and who do not carry firearms in the course of their duties, and all persons in the eleven categories now scheduled for testing in *LaBella*; and it is further

ORDERED: that, pending a decision on the merits, the GSA defendants are hereby enjoined from conducting reasonable suspicion testing of any GSA employee, unless or until the GSA drug testing plan is revised to provide that such testing is based upon reasonable, articulable, and individualized suspicion of use of drugs on duty or off duty,

causing a reasonable suspicion that a specific employee may be under the influence of drugs while on duty.

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

NORMAN HARTNESS, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No.
v.	)	
	)	89-0044 LFO
GEORGE BUSH, et al.,	)	PJA
	)	
Defendants.	)	
	)	

NOTICE OF APPEAL

Notice is hereby given that defendants in this action, Goerge Bush and Phillip D. Larsen,[1] appeal to the United States Court of Appeals for the District of Columbia Circuit from the order entered on January 26, 1990, refusing, in part, to vacate the preliminary injunction entered on May 19, 1989.

Respectfully Submitted,

---

1 Pursuant to Rule 25(d), Phillip D. Larsen is substituted for Raymond P. Kogut as Drug Program Coordinator, Office of Administration, Executive Office of the President.

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ATTORNEY FOR
DEFENDANTS

Dated: February 16, 1990

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90 5050 September Term 1989
CA No. 89-00044

Norman Hartness, et al.

v.

George Bush, President, *et al.*,

Appellants

O R D E R

It appearing that this new case has been filed and docketed, it is

ORDERED that the parties shall submit the following documents (original and one copy, unless otherwise noted) on or before 03-26-90:

1. Appellant(s) Docketing Statement
2. Appearance Forms from each party
3. Submission by appellant of Copy of the Decision of the District Court
4. Appellant(s) Statement of the Issues to be Raised on Appeal
5. A Certificate of Counsel (Gen.R. 11(a)(1)) from each party

6. A Report from appellant certifying that all necessary transcripts, if any, have been ordered, including the date when the transcript was ordered and a statement that satisfactory financial arrangements have been made with the Reporter. A copy of the Report shall be served on each Reporter.

7. Procedural motions from any party which would affect the calendaring of the case. (original and four copies and such motions should not be attached to other filings)

8. Statement from appellant as to whether the parties will utilize a deferred appendix under F.R.A.P. 30(c). (A motion will not be necessary)

It is FURTHER ORDERED that the parties shall file dispositive motions, if any, on or before 04-09-90. *See* Gen.R.(7)(i). (Original and four copies) The filing of the record on appeal and briefing are deferred pending further order.

It is FURTHER ORDERED that appellant shall file and serve a Status Report Concerning Transcripts every 30 days until receipt of all transcripts ordered. Within three (3)

days of receipt of all transcripts, Appellant shall file a Final Status Report Concerning Transcripts. All reports shall be served on the parties and each Reporter.

For the Court:
Constance L. Dupre, Clerk

By: Valerie Williams
Deputy Clerk

Order 86-6
(July, 1987, Rev. 9/88)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

HARTNESS, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 89-0044-LFO
	)	
	)	
BUSH, *et al.*,	)	
Defendants.	)	
	)	

ORDER

In this action, 30 employees of three government agencies challenge the mandatory, random urinalysis drug testing program enacted by the Executive Office of the President ("EOP"). The three agencies involved are the Office of Management and Budget, the Office of Administration, and the Office of the United States Trade Representative. All plaintiffs hold positions designated as "sensitive" by the EOP Plan and are subject to random testing of their urine. Of the 30 plaintiffs, 19 have top secret security clearances, 10 have secret security clearances, and 1 has no security clearance.

On May 19, 1989, a preliminary injunction was entered in this matter barring defendants from conducting the proposed random testing of those plaintiffs who do not hold a White House pass. Both plaintiffs and defendants now

move for summary judgment. In addition, defendants move to stay discovery or for a protective order barring discovery.

In *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), decided after the entry of the preliminary injunction in this matter, the District of Columbia Court of Appeals held that employees holding top secret national security clearances may be subjected to random urinalysis drug testing. The Court of Appeals applied the Supreme Court's ruling in *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), which stated that the government has a compelling interest in protecting "truly sensitive" information, and therefore may require those with access to such information to submit to drug testing. 109 S. Ct. at 1396, 1397. According to the Court of Appeals, "[w]hatever 'truly sensitive' information includes, we agree that it encompasses top secret national security information." 872 F.2d at 491. On the basis of Harmon, it is unlikely that the plaintiffs who hold top secret security clearances will ultimately prevail on the merits.

The permissibility of subjecting plaintiffs who do not hold top secret security clearances to random mandatory urinalysis is less clear. In *Harmon*, the Court of Appeals specifically stated that

> [w]hatever the precise contours of "truly sensitive" information intended by the *Von Raab* Court, we believe that the term cannot include all information which is confidential or closed to public view. A very wide range of government

> employees -- including clerks, typists, or messengers -- will potentially have access to information of this sort.

872 F.2d at 492. In order to determine the permissibility of testing those without top secret clearances, the balancing test set out in *Von Raab* must be applied. Under that test, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 109 S. Ct. at 1390. Where the government interest at issue is that of protecting sensitive material, the Supreme Court has stated that "the criteria used by the [government] in determining what materials are classified and in deciding whom to test under this rubric" must be considered. *Id.* at 1397.

The government contends, in effect, that information classified as "secret" is by definition as "truly sensitive" as top secret information so that employees who hold "secret" security clearances must be subjected to urine testing for drugs at the discretion of the employing government agency. In support of this contention, the government relies upon *American Federal [sic] of Government Employees v. Skinner*, 885 F.2d 884 (D.C. Cir. 1989). In that case, our Court of Appeals approved the testing of urine of Department of Transportation van drivers who, operating without the close supervision of an office environment, transported classified documents by motor vehicle. The Court of Appeals, however, did not rest its

approval of this drivers' testing program solely upon the fact that the drivers' held secret security clearances. Rather, it relied heavily upon, among other things, traffic safety concerns authoritatively addressed in *Skinner v. Railway Labor Executives' Association*, 109 S. Ct. 1402 (1989), as well as the drivers' "regular access to classified information" in an unsupervised environment. 885 F.2d at 893. It is not at all clear in the present state of the controlling decisions that the government may test the urine of all employees solely because they possess secret security clearances irrespective of the circumstances (e.g., their actual access to documents classified as "secret," the general subject matter of the information, and the feasibility of reliance on individualized suspicion to detect drug abuse in the employee's working environment). In fact, on this record, the government is not likely to prevail on what is apparently the essence of its rationale: that a government agency may, in its discretion, test the urine of any employee who possesses a secret security clearance.

The efficient resolution of this original question and efficient review of any decision will be facilitated by further discovery in order to create a reviewable record regarding the criteria the government relied upon to select positions to be tested (including positions with top secret clearances) and whether application of those factors to the particular persons to be tested was reasonable. Accordingly, it is this 26th day of January, 1990, hereby

ORDERED: that defendants' motion to vacate the preliminary injunction should be, and is hereby, granted in part; and it is further

ORDERED: that the preliminary injunction entered in this matter on May 19, 1989, is modified to permit testing of named plaintiffs who have been cleared for access to top secret information; and it is further

ORDERED: that defendants' motion to stay discovery or for a protective order, should be, and is hereby, denied; and it is further

ORDERED: that discovery with regard to the validity of defendants' procedures, rationale, and conclusions concerning designation of positions as Testing Designated Positions because of possession of a Secret or Top Secret security clearance may be conducted until April 26, 1990; and it is further

ORDERED: that this matter shall be referred to Magistrate Attridge for supervision of discovery and resolution of any discovery disputes; and it is further

ORDERED:that supplemental motions for summary judgement shall be filed on or before May 28, 1990.

s/ Louis F. Oberdorfer
UNITED STATES DISTRICT
JUDGE

Federal Register PRESIDENTIAL DOCUMENTS

Vol. 51, No. 180

Wednesday, September 17, 1986

Title 3-

Executive Order 12564 of September 15, 1986

The President

Drug-Free Federal Workplace

I, RONALD REAGAN, President of the United States of America, find that:

Drug use is having serious adverse effects upon a significant proportion of the national work force and results in billions of dollars of lost productivity each year;

The Federal government, as an employer, is concerned with the well-being of its employees, the successful accomplishment of agency missions, and the need to maintain employee productivity;

The Federal government, as the largest employer in the nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace;

The profits from illegal drugs provide the single greatest source of income for organized crime, fuel violent street crime, and otherwise contribute to the breakdown of our society;

The use of illegal drugs, on or off duty, by Federal employees is inconsistent not only with the law-abiding behavior expected of all citizens, but also with the special trust placed in such employees as servants of the public;

Federal employees who use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism than their fellow employees who do not use illegal drugs;

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a serious health and safety threat to members of the public and to other Federal employees;

The use of illegal drugs, on or off duty, by Federal employees in certain positions evidences less than the complete reliability, stability, and good

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judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law; and

Federal employees who use illegal drugs must themselves be primarily responsible for changing their behavior and, if necessary, begin the process of rehabilitating themselves.

By the authority vested in me as President by the Constitution and laws of the United States of America, including section 3301(2) of Title 5 of the United States Code, section 7301 of Title 5 of the United States Code, section 290ee-1 of Title 42 of the United States Code, deeming such action in the best interests of national security, public health and safety, law enforcement and the efficiency of the Federal service, and in order to establish standards and procedures to ensure fairness in achieving a drug-free Federal workplace and to protect the privacy of Federal employees, it is hereby ordered as follows:

Section 1. Drug-Free Workplace.

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Sec. 2. Agency Responsibilities.

(a) The head of each Executive agency shall develop a plan for achieving the objective of a drug-free workplace with due consideration of the rights of the government, the employee, and the general public.

(b) Each agency plan shall include:

(1) A statement of policy setting forth the agency's expectations regarding drug use and the action to be anticipated in response to identified drug use;

(2) Employee Assistance Programs emphasizing high level direction, education, counseling, referral to rehabilitation, and coordination with available community resources;

(3) Supervisory training to assist in identifying and addressing illegal drug use by agency employees;

(4) Provision for self-referrals as well as supervisory referrals to treatment with maximum respect for individual confidentiality consistent with safety and security issues; and

(5) Provision for identifying illegal drug users, including testing on a controlled and carefully monitored basis in accordance with this Order.

Sec. 3. Drug Testing Programs.

(a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.

(b) The head of each Executive agency shall establish a program for voluntary employee drug testing.

(c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an

employee for illegal drug use under the following circumstances:

(1) When there is a reasonable suspicion that any employee uses illegal drugs;

(2) In an examination authorized by the agency regarding an accident or unsafe practice; or

(3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.

(d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Sec. 4. Drug Testing Procedures.

(a) Sixty days prior to the implementation of a drug testing program pursuant to this Order, agencies shall notify employees that testing for use of illegal drugs is to be conducted and that they may seek counseling and rehabilitation and inform them of the procedures for obtaining such assistance through the agency's Employee Assistance Program. Agency drug testing programs already ongoing are exempted from the 60-day notice requirement. Agencies may take action under section 3(c) of this Order without reference to the 60-day notice period.

(b) Before conducting a drug test, the agency shall inform the employee to be tested of the opportunity to submit medical documentation that may support a legitimate use for a specific drug.

(c) Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. Procedures for providing urine specimens must allow individual privacy, unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided.

(d) The Secretary of Health and Human Services is authorized to promulgate scientific and technical guidelines for drug testing programs, and agencies shall conduct their drug testing programs in accordance with these guidelines once promulgated.

Sec. 5. Personnel Actions.

(a) Agencies shall, in addition to any appropriate personnel actions, refer any employee who is found to use illegal drugs to an Employee Assistance Program for assessment, counseling,

and referral for treatment or rehabilitation as appropriate.

(b) Agencies shall initiate action to discipline any employee who is found to use illegal drugs, provided that such action is not required for an employee who:

(1) Voluntarily identifies himself as a user of illegal drugs or who volunteers for drug testing pursuant to section 3(b) of this Order, prior to being identified through other means;

(2) Obtains counseling or rehabilitation through an Employee Assistance Program; and

(3) Thereafter refrains from using illegal drugs.

(c) Agencies shall not allow any employee to remain on duty in a sensitive position who is found to use illegal drugs, prior to successful completion of rehabilitation through an Employee Assistance Program. However, as part of a rehabilitation or counseling program, the head of an Executive agency may, in his or her discretion, allow an employee to return to duty in a sensitive position if it is determined that this action would not pose a danger to public health or safety or the national security.

(d) Agencies shall initiate action to remove from the service any employee who is found to use illegal drugs and:

(1) Refuses to obtain counseling or rehabilitation through an Employee Assistance Program; or

(2) Does not thereafter refrain from using illegal drugs.

(e) The results of a drug test and information developed by the agency in the course of the drug testing of the employee may be considered in processing any adverse action against the employee or for other administrative purposes. Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.

(f) The determination of an agency that an employee use illegal drugs can be made on the basis of any appropriate evidence, including direct observation, a criminal conviction, administrative inquiry, or the results of an authorized testing program. Positive drug test results may be rebutted by other evidence that an employee has not used illegal drugs.

(g) Any action to discipline an employee who is using illegal drugs (including removal from the service, if appropriate) shall be taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act.

(h) Drug testing shall not be conducted pursuant to this Order for the purpose of gathering evidence for use in criminal proceedings. Agencies are not required to report to the Attorney General for investigation or prosecution any information, allegation, or evidence relating to violations of Title 21 of the United States Code received as a result of the operation of drug testing programs established pursuant to this Order.

Sec. 6. Coordination of Agency Programs.

(a) The Director of the Office of Personnel Management shall:

(1) Issue government-wide guidance to agencies on the implementation of the terms of this Order;

(2) Ensure that appropriate coverage for drug abuse is maintained for employees and their families under the Federal Employees Health Benefits Program;

(3) Develop a model Employee Assistance Program for Federal agencies and assist the agencies in putting programs in place;

(4) In consultation with the Secretary of Health and Human Services, develop and improve training programs for Federal supervisors and managers on illegal drug use; and

(5) In cooperation with the Secretary of Health and Human Services and heads of Executive agencies, mount an intensive drug awareness campaign throughout the Federal work force.

(b) The Attorney General shall render legal advice regarding the implementation of this Order and shall be consulted with regard to all guidelines, regulations, and policies proposed to be adopted pursuant to this Order.

(c) Nothing in this Order shall be deemed to limit the authorities of the Director of Central Intelligence under the National Security Act of 1947, as amended, or the statutory authorities of the National Security Agency or the Defense Intelligence Agency. Implementation of this Order within the Intelligence Community, as defined in Executive Order No. 12333, shall be subject to the approval of the head of the affected agency.

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Sec. 7. Definitions.

(a) This Order applies to all agencies of the Executive Branch.

(b) For purposes of this Order, the term "agency" means an Executive agency, as defined in 5 U.S.C. 105; the Uniformed Services, as defined in 5 U.S.C. 2101(3) (but excluding the armed forces as defined by 5 U.S.C. 2102(2)); or any other employing unit or authority of the Federal government, except the United States Postal Service, the Postal Rate Commission, and the employing units or authorities in the Judicial and Legislative Branches.

(c) For purposes of this Order, the term "illegal drugs" means a controlled substance included in Schedule I or II, as defined by section 802(6) of Title 21 of the United States Code, the possession of which is unlawful under chapter 13 of that Title. The term "illegal drugs" does not mean the use of a controlled substance pursuant to a valid prescription or other uses authorized by law.

(d) For purposes of this Order, the term "employee in a sensitive position" refers to:

(1) An employee in a position that an agency head designates Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive under

Chapter 731 of the Federal Personnel Manual or an employee in a position that an agency had designates as sensitive in accordance with Executive Order No. 10450, as amended;

(2) An employee who has been granted access to classified information or may be granted access to classified information pursuant to a determination of trustworthiness by an agency head under Section 4 of Executive Order No. 12356;

(3) Individuals serving under Presidential appointments;

(4) Law enforcement officers as defined in 5 U.S.C. 8331(20); and

(5) Other positions that the agency head determines involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence.

(e) For purposes of this Order, the term "employee" means all persons appointed in the Civil Service as described in 5 U.S.C. 2105 (but excluding persons appointed in the armed services as defined in 5 U.S.C. 2102(2)).

(f) For purposes of this Order, the term "employee Assistance Program" means agency-based counseling programs that offer assessment, short-term counseling, and referral services to employees for a wide range of drug, alcohol, and mental health programs that affect employee job performance. Employee Assistance Programs are responsible for referring drug-using employees for rehabilitation and for monitoring employee's progress while in treatment.

Sec. 8. Effective Date. This Order is effective immediately.

s/ Ronald Reagan

THE WHITE HOUSE,
September 15, 1986.

(FR Doc. 86-21166
Filed 9-15-86; 3:47 pm)
Billing code 3195-01-M

Editorial note: For the President's remarks of September 15, on signing EO 12564, see the Weekly Compilation of Presidential Documents (vol. 22, no. 38).

Appendix A **Part H**

OFFICE OF ADMINISTRATION

A. Statement Agency Mission

The Office of Administration (OA) was established in 1977 to provide common support services to all components of the Executive Office of the President, including upon request, assistance to the White House Office to meet its role of providing services that are primarily in direct support of the President. With this charter, OA provides a full range of common administrative support and services in personnel management, financial management, information management, data processing, library and reference services, non-Presidential records maintenance, messenger, contracting and procurement, office supplies, publishing, facilities management and historic preservation, and non-Presidential mail operations.

These centralized operations for the EOP complex give members of the OA staff access to sensitive and critical programs and operations of the EOP agencies. To ensure the ability to provide such services requires a high degree of staffing flexibility so that most staff members provide their specialized services to more than one EOP agency. The use of illegal drugs by OA employees can lead to impairment of their efficiency which can have an adverse effect on the missions of each of the other EOP agencies. Further, most staff perform their duties in locations, or have freedom of access to locations, that are controlled by the

U. S. Secret Service in their role of protecting the work-environment of the President and his most senior advisers. For these reasons, all employees of the Office of Administration serve in sensitive positions as defined in Executive Order 12564.

B. Testing Designated Positions Listing and Justification Statement

1. Office of the Director:

Director

Secretary to the Director

Deputy Director

Secretary to the Deputy Director

General Counsel

Secretary to the General Counsel

Attorney Advisor(s)

Staff Assistant

Security Officer

Security Specialist

Clerical Assistant(s)

These staff serve in positions with access to sensitive information, either classified or subject to classification, or predecisional sensitive information related to the Presidential actions or activities related to national security.

Employees of these positions have work locations and access to restricted areas. Drug usage could result in release of sensitive information to unauthorized parties that could jeopardize national security or the life of the President.

2. Office of Facilities Management:

Manager, Facilities Management Office

Staff Assistant(s)

Clerical Assistant(s)

These staff serve in positions with work locations and access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

3. Executive Office Building Preservation Office:

Director, EOB Preservation Office

Staff Assistant

Curatorial Assistant

These staff serve in positions with work locations and access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

4. Library and Information Services Division:

Director, Library and Information Services Division

Deputy Director

Supervisory Librarian(s) (Reference)

Librarian(s) (Reference)

Librarian (Law)

Technical Information Specialist(s)

Library Technician(s)

Supervisory Management Analyst (Records)

Management Analyst (Records)

Librarian (Acquisitions)

These staff serve in positions with work locations and/or access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

5. Information Resources Management Division:

Director, Information Resources Management Division

Deputy Director

Supervisory Computer Systems Analyst(s)

Supervisory Computer Programming Analyst(s)

Supervisory Computer Specialist(s)

Computer Systems Analyst(s)

Computer Programming Analyst(s)

Computer Specialist(s)

Communications Specialist(s)

Secretary to the Director, IRMD

Secretary(s) (Typing)

Training Instructor(s) (Office Automation)

These staff serve in positions with work locations and/or access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

6. Personnel Division:

Director of Personnel

Supervisory Personnel Management Specialist(s)

Personnel Management Specialist(s)

Employee Development Specialist

Employee Relations Specialist

Personnel Classification Specialist

Personnel Assistant(s) (Typing)

Clerk Typist(s)

These staff serve in positions with access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

7. Financial Management Division:

Director, Financial Management Division

Budget Officer

Accounting Officer

Supervisory Accountant(s)

Accountant(s)

Supervisory Accounting Technician(s)

Accounting Technician(s)

Supervisory Fiscal Assistant

Payroll Technician(s)

Payroll Clerk(s)

Budget Analyst(s)

Information Management Assistant

These staff serve in positions with access to the operating financial records of all EOP agencies. Further, most have access to restricted areas. Drug usage could result in embezzlement and/or actions that would jeopardize the life of the President.

~~8.~~ Administrative Operations Division:

Director, Administrative Operations Division

Secretary to the Director

Financial Manager

Administrative Officer/Assistant

Management Information Specialist

Supervisory Contract Specialist

Contract Specialist(s)

Procurement Assistant/Clerk(s)(Typing)

Supply Management Officer

Supervisory Supply Technician

Supply Technician/Clerk(s)

Inventory Management Specialist

Labor Foreman

These staff serve in positions with work locations and/or access to restricted areas. Drug usage could result in actions that would jeopardize the life of the President.

9. Administrative Operations Division, Mail and Messenger Unit:

Mail and Messenger Supervisor(s)

Lead Messenger (White House)

Messenger(s) White House

Messenger(s)

Lead Mail Sorter

Mail Clerk(s)

Lead, Motor Vehicle Dispatcher

Lead Motor Vehicle Operator

Motor Vehicle Operator(s)

These staff serve in positions with access to sensitive information and with work locations and/or access to restricted areas. Drug usage could result in release of sensitive information to unauthorized parties that could impair our national security or jeopardize the life of the President.

10. Administrative Operations Division, Publishing and Printing Unit:

Printing Officer

Supervisory Visual Information Specialist

Visual Information Specialist(s)

Supervisory Editorial Assistant

Editorial Assistant(s)(Typing)

Printing Clerk (Typing)

These staff serve in positions with access to sensitive information and with a work location and access to restricted areas. Drug usage could result in the release of sensitive information to unauthorized parties that could impair our national security or jeopardize the life of the President.

C. Administrative Relief

If an employee of the Office of Administration believes that his or her position has been wrongly designated as a testing designated position, the employee may submit an administrative appeal through his or her division/office head to the Director in accordance with the provisions of section VII of the EOP Plan.

D. Decision Level for Deferral of Testing Because of Work Demands

The Director may authorize deferral of testing for an employee whose immediate work-demands require uninterrupted continuation. In the absence of the Director, the General Counsel shall be the deciding official. Approved requests for deferral shall be document documented in writing by the immediate supervisor as soon as possible after decision to defer is made. Such reports shall be sent to the Drug Program Coordinator for follow-up action to schedule the employee for unannounced testing within sixty days.

E. Decision Level for Reasonable Suspicion Testing

If an employee is suspected of using illegal drugs based on the conditions described in section X of the EOP Plan, the facts and circumstances of that case shall be presented to the Director of Personnel who shall decide whether to proceed with testing.

F. Applicant Testing

Preappointment drug testing of applicants tentatively selected for testing designated positions in the Office of Administration is required pursuant to and in accord with section XI of the EOP Plan.

Appendix A **Part I**

OFFICE OF MANAGEMENT AND BUDGET

A. Statement of Agency Mission

The Office of Management and Budget (OMB) is a staff agency within the Executive Office of the President responsible for developing and supporting the President's budget and legislative programs and has lead responsibility for general management and regulatory reform efforts throughout the Executive Branch of the Federal government. The major functions of OMB are to:

- advise the President on fiscal and economic policies for the Nation;
- prepare the budget and formulate the Government's fiscal program;
- supervise and control the administration of the Executive Branch budget;
- clear and coordinate departmental recommendations for proposed legislation and for Presidential action on bills passed by Congress;
- assist in the consideration, clearance and preparation of Executive Orders and Presidential proclamations;
- implement major new initiatives on information policy, paperwork reduction and regulatory reform;

- provide overall direction of procurement policies, regulations and procedures for Executive Branch agencies;

- review the organizational structures and management procedures of the Executive Branch to assure that they produce intended results;

- keep the President advised of agencies' activities: proposed, actually initiated and completed.

Because of its unique position as a central management agency, the OMB staff has direct involvement in Presidential decisionmaking. In addition, OMB staff has frequent interaction with highlevel policy officials throughout the Government. As a result, OMB staff has access to classified and other sensitive information concerning all Federal programs. Access to this kind of sensitive information, as well as the close physical proximity of OMB staff to the President and senior White House officials, demands a staff of the highest integrity and trust. All positions have been determined to be sensitive as defined in Executive Order 12564.

B. Testing Designated Positions Listing and Justification Statements

1. The following sensitive positions are identified as testing designated positions since the individuals filling these positions serve under Presidential appointments with Senate confirmation:

Director

Deputy Director

Administrator, Office of Federal Procurement Policy

2. The following sensitive positions are identified as testing designated positions since they require Top Secret security clearance or other special security clearances. These positions regularly deal with sensitive national security, law enforcement, nuclear or other technical issues requirinq specific clearances, and/or are involved with performing sensitive OMB policy functions requiring a high degree of trust and confidence:

Executive Assistant to the Director, DO

Executive Assistant to the Deputy Director, DO

Executive Associate Director, DO

Associate Director for Communications and Public Liaison, DO

Staff Assistant to the Deputy Director, DO

Confidential Assistant to the Director, DO

Assistant Director for Public Affairs, PA

General Counsel, GC

Deputy General Counsel, GC

Associate Director for Legislative Affairs, LA

Assistant Director for Legislative Reference, LRD

Associate Director for Economic Policy, EP

Associate Director for Privatization, DO

Assistant Director for Budget Review, BRD

Administrative Assistant, BRD

Chief, Resources Systems Branch, BRD

Associate Director for NSIA, AD/NSIA

Budget Examiner(s), IAD

Deputy Associate Director for International Affairs, IAD

Chief, International Security Affairs Branch, IAD

Secretary, IAD Chief, StateUSIA Branch, IAD

Deputy Associate Director for National Security, NSD

Budget Examiner(s), NSD

Chief, Intelligence Branch, NSD

Chief, Air Force Branch, NSD

Chief, Navy Branch, NSD

Chief, Army Branch, NSD

Deputy Chief, NSD

Secretary(s), NSD

Operations Research Analyst, NSD

Policy Analyst, NSIA/SSD

Secretary, NSIA/SSD

Deputy Associate Director for Special Studies, NSIA/SSD

Associate Director for HRVL, AD/HRVL

Associate Director for EG, AD/EG

Budget Examiner(s), TCJ

Budget Examiner, HTP

Associate Director for NRES, AD/NRES

Budget Examiner(s), NRD

Budget Examiner, ESD

Operations Research Analyst(s), ESD

Deputy Associate Director for Energy and Science, ESD

Chief, Nuclear Energy Branch, ESD

Deputy Associate Director for NRES, NRES/SSD

Secretary, NRES/SSD

Associate Director for Management Administrator, OIRA

Management Analyst, OIRA

Attorney, OIRA

Deputy Administrator, OFPP

Secretary, AD/NSIA

Secretary to the Deputy Director, DO

Staff Asst. to the Executive Asst. to the Director, DO

Confidential Asst. to the Executive Asst. to the Director, DO

Special Assistant to the Director, DO Attorney Advisor, DO

Confidential Asst. to the Executive Associate Director, DO

Secretary to the Director(s), DO

Secretary(s), DO

Public Affairs Specialist(s), PA

Attorney(s), GC

Secretary(s), GC

Confidential Secretary to the General Counsel, GC

Chief, Correspondence Unit, ADM

Correspondence ClerkTypist, ADM

Legislative Assistant(s), LA

Special Assistant to the Director, LA

Admin. Asst. to the Assoc. Director for Legislative Affairs, LA

Secretary(s), LA

Secretary to the Associate Director for Economic Policy, EP

Economist(s), EP

Special Assistant, EP

Admin. Asst. to the Assoc. Director for HRVL, AD/HRVL

Secretary to the Associate Director for EG, AD/EG

Secretary to the Associate Director for NRES, AD/NRES

Secretary to the Associate Director for Management, AD/MGM

Staff Assistant to the Administrator, OIRA

Assistant Director for Administration, ADM

Budget and Management Officer, ADM

Support Services Specialist, ADM

Deputy Associate Director for Economic Po1icy, EP

Chief, Fiscal Analysis Branch, BRD

Deputy Chief, Fiscal Analysis Branch, BRD

Chief, Budget Preparation Branch, BRD

Deputy Assistant Director for Budget Review, BRD

Chief, Central Budget Management Branch, BRD

Chief, Manpower, Pay and Policy Branch, NSD

Deputy Associate Dir. for Health and Income Maintenance, HID

Chief, Veterans Affairs Branch, LVE

Chief, Education Branch, LVE

Deputy Assoc. Dir. for Labor, Veterans and Education, LVE

Chief, Treasury Branch, HTP

Chief, Housing Branch, HTP

Deputy Assoc. Dir. for Housing, Treasury and Postal, HTD

Chief, Transportation Branch, TCJ

Chief, Commerce Branch, TCJ

Deputy Assoc. Dir. for Transportation, Commerce & Justice, TCJ

Deputy Associate Director for Special Studies, EG/SSD

Deputy Associate Director for Special Studies, HRVL/SSD

Chief, Water Resources Branch, NRD

Chief, Agriculture Branch, NRD

Chief, Interior Branch, NRD

Chief, Environment Branch, NRD

Deputy Associate Director for Natural Resources, NRD

Chief, NonNuclear Energy Branch, ESD

Chief, Science and Space Programs Branch, ESD

Deputy Associate Director for Government Operations, MGM

Chief, Personnel and General Services Branch, MGM

Chief, Information Policy Branch, OIRA

Deputy Administrator, OIRA

Chief, Commerce and Lands Branch, OIRA

ClerkTypist, ADM

Secretary ADM

Secretary, LRD

Budget Methods Specialist, BRD

Secretary, BRD

Budget Examiner(s), IAD

Economist(s), IAD

Secretary(s), IAD

Budget Examiner(s), NSD

Secretary(s), NSD

Policy Analyst, NSIA/SSD

Economist(s), NSIA/SSD

Secretary, NSIA/SSD

Budget Examiner(s), TCJ

Budget Examiner(s), HTP

Economist, EG/SSD

Economist, NRD

Secretary(s), ESD

Budget Examiner, ESD

Program Analyst(s), ESD

Operations Research Analyst, ESD

Economist, NRES/SSD

Secretary, MGM

Budget Examiner, MGM

Senior Management Associate, MGM

Management Analyst, OIRA

Secretary, OIRA

Policy Analyst, OIRA

3. The following sensitive positions are identified as testing designated positions since they are involved with performing sensitive OMB policy functions requiring a high degree of trust and confidence.

Secretary to the Deputy Director, DO

Special Assistant to the Director, DO

Secretary(s), GC

Human Resources Manager, ADM

Human Resources Specialist, ADM

Chief, Economic Affairs Branch, IAD

Chief, Human Resources and Housing Branch, OIRA

Chief, Natural Resources Branch, OIRA

Chief, Statistics Policy Branch, OIRA

Chief, Information Technology Management Branch, OIRA

Associate Administrator for Management Controls, OFPP

Budget Examiner, AD/EG

Chief, Economics/Science/General Governnent Branch, LRD

Chief, Resources/Defense/International Branch, LRD

Chief, Labor/Welfare/Personnel Branch, LRD

Deputy Chief, Budget Preparation Branch, BRD

Chief, Health and Social Services Branch, HIMD

Chief, Income Maintenance Branch, HIMD

Chief, Health Financinq Branch, HIMD

Chief, Labor Branch, LVE

Deputy Associate Director for Financial Management, MGM

Chief, Financial Systems and Policy Ranch, MGM

Chief, Productivity Management Branch, MGM

Chief, Credit and Cash Management Branch, MGM

4.The following sensitive positions are identified as testing designated positions since they are regularly involved with the safe operation and maintenance of motor vehicles:

Motor Vehicle Operator(s)

C. Administrative Relief

If an employee of the Office of Management and Budget believes that his or her position has been wrongly designated as a testing designated position, the employee may submit an administrative appeal through his or her immediate supervisor and division/office head to the Director in accordance with the provisions of section VII D of the EOP Plan.

D. Decision Level for Deferral of Testing Because of Work Demands

The Director, and in his or her absence, the Deputy Director, may authorize deferral of testing for an employee whose immediately workdemands require uninterrupted continuation. Approved requests for deferral shall be documented in writing by the immediate supervisor as soon

as possible after a decision to defer is made. Such reports shall be sent to the Drug Program Coordinator for followup action to schedule the employee for unannounced testing within sixty days.

E. Decision Level for Reasonable Suspicion Testing

If an employee is suspected of using illegal drugs based on the conditions described in section X of the EOP Plan, the facts and circumstances of that case shall be presented to the secondlevel supervisor of the suspected employee who shall decide, after consultation with the Assistant Director for Administration and General Counsel, whether to proceed with testing.

F. Applicant Testing

Preappointment drug testing of applicants tentatively selected for a testing designated position in the Office of Management and Budget is required pursuant to and in accord with section XI of the EOP Plan.

Appendix A **Part L**

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

A. Statement of Agency Mission

The Office of the United States Trade Representative (USTR) is responsible for developing and coordinating the Nation's international trade, commodity, and direct investment policy, and leading or directing negotiations with other countries on such matters. The U. S. Trade Representative is a Cabinet level official who acts as the principal trade adviser, negotiator, and spokesman for the President on trade and related investment matters. Through the interagency structure, the USTR coordinates trade policy, resolves agency disagreements, and frames issues for Presidential decision.

The USTR has been the focal point of Congressional interest in increasing the effectiveness of the United States in international trade. The current responsibilities of the Office were established by Reorganization Plan No. 3 of 1979. The Senate report on that Plan stated the purpose to "centralize the policymaking and negotiating functions for international trade in an enlarged White House office" with "authority to issue guidelines to other agencies determining U. S. policy on major international trade matters."

Hence, the USTR manages an important Presidential decisionmaking process on international trade, ensuring that the President receives the widest range of advice.

Further, in the trade policy area, the USTR helps the President plan and set priorities, monitor and evaluate progress toward reaching the President's trade policy objectives, resolve conflicts among Cabinet officers and line subordinates, and assist in crisis management in trade policy areas of great importance to an essential component of economic policy that affects the foreign relations of the United States.

The USTR, his deputies in Washington and Geneva, and Chief Textile Negotiator, hold the rank of Ambassador. There are two office locations, one in Washington, D. C. and the other in Geneva, Switzerland.

A USTR drug-free workplace recognizes the unique role of the agency as part of the Executive Office of the President, as well as a practical reality that drugs in the USTR workplace are incompatible with the consistently high level of performance that is essential if USTR's trade responsibilities, on behalf of the President, are to be successfully carried out.

Public and foreign government perception of the USTR as the lead trade agency for the President, as providing direct and close support to the President on trade policy, and with access to sensitive trade matters that come before the President, requires solid assurance that there is a drug-free staff. Broadly speaking, USTR staff require the highest trust and confidence. All positions in the USTR have been determined to be sensitive positions as defined in Executive Order 12564.

B. Testing Designated Positions Listing and Justification Statement

All of the positions in the Office of the United Statos Trade Representative share in a significant degree characteristics related to their sensitivity and the vulnerability that would occur should staff occupying these positions be impaired by drug use. Each position has also been evaluated against functional criteria and independence of authority criteria to ensure that their selection as testing designated positions is supportable. The key characteristics of selected positions include some to all of the following:

- Access to sensitive pre-decisional trade information prepared for the President and his most senior advisers:
- Access to national security classified information, and/or other sensitive information on U. S. negotiating positions, business confidential information, information from foreign governments in on-going negotiations, and other sensitive information used to develop negotiating positions;
- Freedom of access to the White House complex;
- Represent the President and the Nation in negotiations with foreign governments, in dealings with the Congress, the public, to leaders of business and industry, and to international organizations;

Certain selected testing designated positions have responsibility for maintenance of sensitive computer data bases and systems or are responsible for safe vehicle transportation of public officials. The following is a current listing of testing designated position titles in the Office of the the United States Trade Representative. These are subject to change as the USTR exercises his statutory personnel management authorities:

United States Trade Representative

Deputy United States Trade Representative(s)

Chief of Staff

Executive Secretary

Executive Assistant(s)

Confidential Assistant(s) to (Various)

Confidential Secretary(s) to (Various)

Counselor to the USTR

Attorney Advisor(s)

General Counsel

Senior Deputy General Counsel

Deputy General Counsel

Chief Textile Negotiator

International Economist(s)

Special Negotiator for US/Canada, Coord. for North Am. Affairs

Assistant United States Trade Representative(s) for (Various)

Deputy Asst. United States Trade Representative(s) for (Various)

Staff Assistant(s)

Foreign Affairs Officer(s)

International Trade Specialist(s)

Policy Analyst(s)

Congressional Affairs Officer

Legislative Analyst

Director(s) (Office or Function)

Public Affairs Specialist(s)

Computer Specialist(s) (Various)

Secretary(s)

Research Assistant(s)

Economics Assistant(s)

Budget Analyst

Motor Vehicle Operator(s)

Procurement Assistant

Administrative Aide

Support Services Specialist

Human Resources Management Specialist

Correspondence and Information Control Assistant

C. Administrative Relief

If an employee of the office of the United States Trade Representative believes that his or her position has been wrongly designated as a testing designated position, the employee may submit an administrative appeal through his or her immediate supervisor to the Assistant U.S. Trade Representative for Administration in accordance with the provisions of section VIID of the EOP Plan.

D. Decision Level for Deferral of Testing Because of Work Demands

A Deputy United States Trade Representative may authorize deferral of testing for an employee whose immediate workdemands require uninterrupted continuation. Request for deferral shall only be made by the Assistant U. S. Trade Representative having supervisory responsibility over the employee requiring deferral. Approved requests for deferral shall be documented in writing by the responsible Assistant U.S. Trade Representative as soon as possible after a decision to defer is made. Such reports shall be sent to the Drug Program Coordinator for follow-up action to schedule the

deferred employee for unannounced testing within sixty days.

E. Decision Level for Reasonable Suspicion Testing

If an employee is suspected of using illegal drugs based on conditions described in section X of the EOP Plan, the facts and circumstances of that case shall be presented to the Deputy U.S. Trade Representative (for Management) who shall decide whether to proceed with testing. All such cases shall be reviewed by the supervising Assistant U.S. Trade Representative in consultation with the Assistant U.S. Trade Representative for Administration prior to presentation to the Deputy U.S. Trade Representative.

F. Applicant Testing

Preappointment drug testing of applicants tentatively selected for a testing designated position in the Office of the U. S. Trade Representative is required pursuant to and in accord with section XI of the EOP Plan.

FILED
MAY 31 1991
OFFICE OF THE CLERK

No. 90-1683

In the Supreme Court of the United States

OCTOBER TERM, 1990

NORMAN HARTNESS, ET AL., PETITIONERS

v.

GEORGE HERBERT WALKER BUSH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits random drug testing of employees of the Executive Office of the President (EOP) who hold secret-level national security clearances.

2. Whether respondents' claim that certain of the EOP employees were included in the random testing pool because they hold secret-level national security clearances is a post hoc rationalization that is invalid under the Administrative Procedure Act.

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§ 2.2(f)(16) 3

§ 2.7 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-25a) is reported at 919 F.2d 170. The opinions of the district court (Pet. App. 26a-52a, 58a-62a) are reported at 712 F. Supp. 986 and 751 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1990. A petition for rehearing was denied on February 4, 1991. The petition for a writ of certiorari was filed on May 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986), the Executive Office of the President (EOP) issued its Drug-Free Workplace Plan in July 1988. The Plan applies to the White House Office, the Office of the Vice President, and several separate agencies that bear a close relationship to the work of the President. Pet. App. 5a.[1] EOP components form the President's staff institution, providing day-to-day operational support directly for the President and the Vice-President.

To achieve a drug-free workplace, the EOP Plan authorizes several forms of drug testing, including reasonable suspicion testing, applicant testing, accident or unsafe practice testing, voluntary testing, random testing, and follow-up testing. See EOP Plan. Random testing applies only to employees who hold sensitive positions. Each component agency is responsible for determining which of its employees hold such positions. Pet. App. 5a. Employees have the right to file an administrative appeal before testing occurs if they feel that their position has been erroneously designated as sensitive. EOP Plan 27.

The procedures for obtaining urine specimens and for testing the specimens under the EOP Plan are not materially different from the procedures upheld in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 661-663, 672 n.2 (1989) (testing procedures "significantly minimize" a

[1] A list of the EOP component agencies to which the EOP Plan applies is found in Section E (Scope) of the Introduction to the EOP Plan. App. A, at 12. After the EOP Plan was issued, four additional agencies were added to the list of EOP agencies subject to the Plan: the Office of National Drug Control Policy, the National Space Council, the President's Intelligence Oversight Board, and the President's Foreign Intelligence Advisory Board. One of the EOP agencies listed in the EOP Plan has expired: the White House Conference for a Drug-Free America.

drug testing program's intrusion on the reasonable privacy expectations of employees). For example, the EOP Plan requires advance notice of random testing at least 30 days before testing is to occur, and specifies that employees may supply their specimens unobserved and in private, unless collection site personnel have reason to believe that the employee may alter or substitute the specimen to be provided. EOP Plan 27, 30; HHS Mandatory Guidelines for Federal Workplace Drug Testing Programs § 2.2(f)(7) and (16) (1988). A drug test may be reported as positive only if it is confirmed by a Medical Review Officer, a licensed physician who must examine alternative medical explanations for a positive test result. HHS Guidelines § 2.7.

2. Petitioners are 23 employees who work in one of three EOP component agencies: the Office of Administration, the Office of Management and Budget, and the Office of the United States Trade Representative. Each plaintiff holds a position that has been identified as subject to random testing. Fourteen petitioners hold "top secret" national security clearances; eight petitioners hold "secret" national security clearances. The remaining petitioner does not hold a national security clearance. Because she does not hold at least a secret-level clearance, she was not the subject of this appeal.[2]

After petitioners received individual notices informing them that they could be randomly tested within 30 days, petitioners filed the present lawsuit to challenge the Plan's random testing requirement. Shortly thereafter, the district court issued a preliminary injunction barring the three EOP agencies at issue from conducting random testing of peti-

[2] The remaining plaintiff was identified for random drug testing because she holds a pass that allows her access to the Old Executive Office Building and because she has access to sensitive information. After the district court, issued the order in question, six plaintiffs left the government, one withdrew from this case, and one voluntarily downgraded his security clearance level from top secret to secret.

tioners, except for those who hold a White House pass.[3] Pet. App. 51a. Subsequently, the district court vacated the injunction in part to allow random testing of petitioners who hold top secret clearances, based on an intervening decision upholding random testing of Department of Justice attorneys who hold top secret clearances. *Harmon* v. *Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990). The district court refused, however, to permit random testing of employees who hold secret national security clearances. Pet. App. 62a.[4]

3. The EOP agencies at issue appealed the district court's refusal to allow testing of "secret" clearance-holders, and the court of appeals reversed the district court in that respect by a divided vote. Pet. App. 4a-25a. The majority noted that, under its decision in *Harmon* v. *Thornburgh*, persons who hold a top secret security clearance can be subjected to random drug testing. The majority concluded that this Court's decision in *Von Raab* does not prohibit an agency from concluding that persons holding secret-level national security clearances may be subjected to random drug testing regardless of whether they are likely to use classified infor-

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[3] A White House pass permits access to the entire White House complex, including the West and East Wings of the White House, the Old Executive Office Building (OEOB), the New Executive Office Building (NEOB), and the Winder Building. The Secret Service also issues two other kinds of passes. The OEOB pass permits access to the OEOB, the NEOB, and the Winder Building. The NEOB pass permits access to the NEOB and the Winder Building.

[4] There are three levels of national security classification under Exec. Order No. 12,356, 3 C.F.R. 166 (1982 comp.). "Top secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security." *Id.* § 1.1(a)(1). "Secret" information is information "the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security." *Id.* § 1.1(a)(2). "Confidential" information is information "the unauthorized disclosure of which reasonably could be expected to cause damage to the national security." *Id.* § 1.1(a)(3). See Pet. App. 6a n.1.

mation and regardless of how closely they are supervised. The majority also found no material distinction for Fourth Amendment purposes between "secret" and "top secret" security clearances, and, for that reason, held that it is reasonable under the Fourth Amendment for the EOP to test all employees who hold secret-level security clearances. *Id.* at 9a-10a; *id.* at 11a (Mikva, C.J., concurring).

Judge Edwards dissented. Pet. App. 12a-25a. He disagreed with the majority that persons holding a secret security clearance could be subjected to random drug testing. In his view, to answer that question a court must follow a "case-by-case, highly contextual approach," requiring close consideration of factors such as "the probability that tested employees will gain actual access to sensitive information and the degree to which they are already supervised on the job," *id.* at 21a.

ARGUMENT

1. Petitioners maintain that the court of appeals erred in upholding the drug testing program adopted for the Executive Office of the President and challenged in this case. That claim does not warrant review by this Court.

a. There is no conflict among the circuits on the first question presented by this case. Several courts of appeals have approved random testing of government employees who hold sensitive positions of various types. See, *e.g.*, *Guiney* v. *Roache*, 873 F.2d 1557 (1st Cir.) (police officers who are required to carry firearms), cert. denied, 493 U.S. 963 (1989); *Transport Workers' Union, Local 234* v. *Southeastern Pennsylvania Transp. Auth.*, 884 F.2d 709 (3d Cir. 1989) (public transit employees); *Thomson* v. *Marsh*, 884 F.2d 113 (4th Cir. 1989) (Army civilian employees who have access to chemical warfare material); *Taylor* v. *O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional officers who come in regular contact with prisoners); *Rushton* v. *Nebraska Public Power Dist.*, 844 F.2d 562 (8th

Cir. 1988) (nuclear power plant employees); *Bluestein* v. *Skinner*, 908 F.2d 451 (9th Cir. 1990) (air traffic controllers, flight crew members, and certain other employees holding safety-related positions in the airline industry), cert. denied, 111 S. Ct. 954 (1991); *Harmon* v. *Thornburgh*, *supra* (Department of Justice lawyers who have top secret national security clearances). The decision below is fully consistent with those cases.

b. The decision below is also correct. In *Von Raab*, this Court sustained against a Fourth Amendment challenge a drug testing program requiring Customs Service employees to submit to urinalysis if they sought a transfer or promotion to positions in drug interdiction or law enforcement efforts, or that required employees to carry firearms. The Court ruled that, on balance, the government's interests in ensuring that front-line drug interdiction personnel are physically fit and have an unimpeachable integrity outweighs the privacy interests of the affected Customs Service employees. 489 U.S. at 665-677. Similarly, in *Harmon* v. *Thornburgh*, the D.C. Circuit concluded that Department of Justice employees with top secret security clearances can be required to undergo random urinalysis tests even if such employees do not regularly (if at all) use such classified information. 878 F.2d at 491-492. Relying on this Court's recognition in *Von Raab* that the federal government is entitled to safeguard sensitive information against disclosure, see 489 U.S. at 677, the court in *Harmon* held that employees who have access to top secret information can be required to undergo drug testing. 878 F.2d at 491-493. *Harmon* also concluded that if submission to drug testing can be made a requirement for obtaining access to top secret information, it also was "reasonable" under the Fourth Amendment to make drug testing a requirement to hold a top secret security clearance. "The whole point of granting top secret security clearances in advance is to provide

flexibility, to ensure that employees can be given access to top secret materials as soon as the need arises." *Id.* at 492.

In this case, the court of appeals determined that the same principles apply in the case of employees holding secret national security clearances. The difference between the two classification levels, the court explained, turned on the degree of damage to the national security that could result from the improper disclosure of classified information. Pet. App. 6a n.1, 9a. That ruling is correct. Information is classified as "top secret" if its disclosure would cause "exceptionally grave" damage to the national security, while information is classified as "secret" if its disclosure would cause "serious" damage to the national security. See Exec. Order No. 12,356, §§ 1(a)(1) and (2), 3 C.F.R. 166 (1982 comp.). As the court of appeals correctly determined, Pet. App. 9a, that distinction is not significant for Fourth Amendment purposes. In fact, this Court has recognized that the government has a compelling interest in protecting against the disclosure of either type of information. See *Department of the Navy* v. *Egan*, 484 U.S. 518, 521 n.1 (1988) (upholding the government's right to revoke a national security clearance held by an employee whose job was defined to include "[a]ccess to Secret or Confidential information"); *Snepp* v. *United States*, 444 U.S. 507, 509-516 & n.3 (1980) (upholding the CIA's authority to require former employees to submit publications for preclearance in order to prevent the disclosure of national security material that was classified at any level); *United States* v. *Reynolds*, 345 U.S. 1 (1953) (upholding executive privilege claim without distinguishing among levels of classification); *Totten* v. *United States*, 92 U.S. 105, 106 (1875). Those decisions show that the government has a compelling interest in protecting national security materials at every classification level.

Petitioners do not claim that the court of appeals erred in that regard. Instead, their principal argument is that the court of appeals did not follow the analysis that they believe is required by *Von Raab*, because that court did not consider whether petitioners are likely to have access to secret national security information in their daily work and whether petitioners work in an unsupervised environment. Pet. 11-16. That claim does not warrant further review.

In *Von Raab*, this Court acknowledged that the government has a compelling interest in safeguarding against improper disclosure "truly sensitive information," 489 U.S. at 677, and that employees who seek promotions to positions where they would handle "sensitive information" can be required to submit to such tests, particularly if the employees already must undergo other intrusions, such as background investigations, which reduce their expectation of privacy. *Id.* at 677-678. But the Court found it unclear whether all of the covered Customs Service employees, which included "Animal Caretaker[s]" and "Baggage Clerk[s]," *id.* at 678, were likely to gain access to sensitive information. The Court therefore remanded the case to the lower courts to perform that inquiry, as well as to determine the privacy expectations that the employees otherwise enjoyed and the degree of supervision to which they are subject. *Ibid.*

Contrary to petitioners' claim, *Von Raab* does not prohibit an agency from requiring employees who hold top secret or secret national security clearances from having to undergo drug testing. Given some of the positions designated for drug testing in *Von Raab*, the record in that case left some question whether the category of employees to be tested had been defined "more broadly than necessary to meet the purposes of" the Customs Service's testing program. 489 U.S. at 678. In this case, by contrast, the EOP agencies in question have determined that the petitioners who are the subject of this appeal must be required to

undergo random drug testing because they hold (at least) secret-level clearances, regardless of whether they currently handle classified information or whether they work in an unsupervised environment. Thus, unlike in *Von Raab*, there is no uncertainty here with respect to *how* employees have been selected for random testing, and no reason for concern that employees will be tested who do not qualify for access to sensitive information. Beyond that, petitioners do not challenge the court of appeals' reasons for concluding that the covered employees' likelihood of access to classified information and the degree of supervision they have in their work environment need not be given independent weight in the balance under *Von Raab*. See Pet. App. 8a-9a. Under these circumstances, further review of petitioners' claim is not warranted.

2. Petitioners also maintain that review is warranted because the government's proffered justification for testing employees with secret-level security clearances is "a post-hoc rationalization" of the type that is invalid under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. Pet. 16-18. That factbound claim, which the court of appeals did not address, is insubstantial.

As the D.C. Circuit recognized in *Harmon* v. *Thornburgh*, 878 F.2d at 494-495 n.19, drug testing plans like the one challenged in this case are exempt from the procedural requirements of the APA because they are "paradigmatic examples of 'matter[s] relating to agency management or personnel,' *see* 5 U.S.C. § 553(a)(2)." In addition, the respondent agencies have made it clear in this litigation that the petitioners who are the subject of this appeal have been identified for random drug testing because they hold secret security clearances. The decision to include secret-level security clearance employees in the pool of individuals subject to random drug testing was a policy decision made by appropriate agency personnel, not a post-hoc rationaliza-

tion of an agency rule or decision. Nothing more is necessary to support an agency's employment-related actions of this type.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-1683

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NORMAN HARTNESS, *ET AL.*,

PETITIONERS

v.

GEORGE HERBERT WALKER BUSH, *ET AL.*,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS IN REPLY TO RESPONDENTS' OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NORMAN HARTNESS, *et al.*,

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GEORGE HERBERT WALKER BUSH, *et al.*,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI

Petitioners hereby offer this reply to Respondents' Brief in Opposition to the issuance of a writ of certiorari in this case.

ARGUMENT

1. The government's opposition ignores the *raison d'être* of the petition, namely that the decision of the court below would appear to permit the repeated mandatory random urinalysis drug testing of more than two million federal and federally regulated employees simply because they hold a "secret" security clearance. Certiorari should be granted because the vast manifestations of "secret" data and "secret" clearance holders make the use of such a proxy for the fact-specific, case-by-case analysis

mandated by this Court in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), inappropriate. Whether any of the over two million "secret" clearance holders can be randomly tested cannot properly be determined without an analysis of whether they have access to the type of "truly sensitive" information this Court contemplated in *Von Raab*. The result should be different for a federal employee who works as an economist or trade specialist at the Office of the USTR or budget examiner at OMB than for a federal employee who works on nuclear submarines for the Navy.

2. The government's attempt to distinguish the positions designated for testing in this case from the positions designated in *Von Raab* must fail. The sole distinction offered is that petitioners possess a "secret" security clearance. Brief in Opposition at 9 (hereinafter "Opp. at ___"). But in substance, the "clerical assistants," "clerk-typists" and "budget analysts" involved in this case are no different from the "baggage clerk," "mail clerk/assistant" or "accountant" in *Von Raab*, for whom testing was found inappropriate because it was not clear that they were "likely to gain access to sensitive information." *Von Raab*, 489 U.S. at 678. As the declarations filed in the District Court by several petitioners reveal, the information to which they have access is far from "truly sensitive"; rather, it is the sort of information that is commonly available to lower- and mid-level professional employees in other federal agencies and departments. *See* Pet. at 13. Moreover, as discussed below, the distinction put forward by the government is suspect

because the EOP plan did not specifically focus on the level of clearance associated with the positions designated for testing. *See* Pet. at 6-7.

3. The four cases cited by respondents for the proposition that courts have found a compelling government interest in protecting information subject to "secret" or "top secret" classifications, Opp. at 7, do not stand for that proposition. In those cases, the level of clearance was not important; rather, the *substance* of the information was dispositive. For example, in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), a civilian employee was denied a security clearance which would have allowed him access to secret or confidential information concerning the Trident ballistic missile submarine, "described as the most sophisticated and sensitive weapon in the Navy's arsenal and as playing a crucial part in our Nation's defense system." *Id.* at 520, 521 n.1. In *Snepp v. United States*, 444 U.S. 507 (1980), the information at issue included "'information regarding intelligence sources and methods.'" *Id.* at 511 (citation omitted). The *Snepp* Court, in a footnote, emphasized that "[f]ew types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties." *Id.* at 511 n. 6. In *United States v. Reynolds*, 345 U.S. 1 (1953), which involved the crash of a B-29 bomber testing secret electronic equipment, this Court upheld the government's refusal to produce Air Force investigation reports in suits by widows of three civilian observers on the asserted ground that the materials could not be furnished "'without seriously hampering national

security, flying safety, and the development of highly trained technical and secret military equipment.'" *Id.* at 4-5 (citing affidavit of U.S. Air Force Judge Advocate General). Finally, in *Totten v. United States*, 92 U.S. 105 (1875), the information at issue concerned "the number of troops stationed at different points in the insurrectionary [Confederate] States,... plans of fortification, and ... such other information as might be beneficial...." gathered by a spy on behalf of President Abraham Lincoln. *Id.*

Each of the foregoing cases dealt with classified information in the military or intelligence field, the type of information traditionally associated with issues regarding national security. This is the type of "truly sensitive" information this Court apparently contemplated in *Von Raab* when it cited *Egan*. *Von Raab*, 489 U.S. at 677. Here, there has been no showing that petitioners have access to that type of information or to information of equivalent sensitivity. *See* Pet. at 13. Indeed, the result of the government's approach, which substitutes a "secret" label for the *Von Raab* analysis, is that there is no way for a court to know what types of information the proposed testees may see.

4. The cases cited by the government in support of its assertion that several lower courts have approved random testing of government employees in sensitive positions, Opp. at 5, simply serve to demonstrate the appropriateness of the fact-specific, case-by-case analysis mandated by *Von Raab*. Each of the cases cited by respondents employed a fact-specific analysis; none permitted the use

of a mere label, such as a security clearance, as a proxy for testing.

For example, in *Guiney v. Roache*, 873 F.2d 1557 (1st Cir.), *cert. denied*, 493 U.S. 963 (1989), the court applied a job-specific analysis in approving random testing for police officers who carry firearms and/or participate in drug interdiction, finding them indistinguishable from the customs agents in *Von Raab*. However, finding the record insufficient to justify testing other police department employees, the court remanded for further consideration. *Id.* at 1558. In *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 884 F.2d 709 (3d Cir. 1988), the Court of Appeals for the Third Circuit approved random testing of public transit employees noting "the careful tailoring of the program to cover only employees in safety-sensitive positions." *Id.* at 711. In *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989), the Court of Appeals for the Seventh Circuit, in approving random drug testing of correctional officers who come in regular contact with prisoners, performed an extensive factual analysis of each test designated position. 888 F.2d at 1196-1200. In performing this analysis, the court concluded that the Cook County Department of Correction's interests were "not furthered by testing all corrections officers." *Id.* at 1197. Indeed, the court concluded that the Department had defined the category of employees more broadly than necessary and decided that "only those employees in contact with prisoners are implicated by...the governmental interests here." *Id.* at 1197. Obviously, the government's position in this case is

not supported by this line of appellate decisions. In fact, it is directly contrary to their guiding principle: that random drug testing programs must be examined with care and may not be imposed upon a large and varied class of employees simply because they share a job title or some other nominal similarity.

Moreover, respondents' reliance on *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990), is misplaced. As Judge Edwards explained in his dissent below, *Harmon* was wrongly decided because it ignored *Von Raab's* teaching that random drug testing may not be imposed on a dragnet basis. However, even if *Harmon* is viewed as having been correctly decided (on the ground that all employees who hold top secret security clearances really do have access to truly sensitive information), the extension of its *per se* approach is not defensible under either the Fourth Amendment or *Von Raab*. The constitutionality of subjecting all "secret" clearance holders to random drug testing -- and the government has stated that employees who hold mere "confidential" clearances are, in its view, equally subject to random testing without further justification[1] -- is a matter worthy of this Court's attention

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1 *See* Government's Motion for Summary Reversal in the Court of Appeals for the District of Columbia Circuit, at 10 (Feb.16, 1990).

because of the vast number of employees affected and the seriousness of the intrusion on their privacy.

5. The government's assertion that drug testing plans are exempt from APA requirements misses the point of petitioners' assertion that agency counsel's post-hoc rationalization of the criteria for test designation should not be accepted by this Court. Opp. at 9. The requirement that a reviewing court "must judge the propriety of such action solely by the grounds invoked by the agency," and that the "basis must be set forth with such clarity as to be understandable," *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), is grounded in common law, not APA procedural requirements. *See* K.Davis, 3 Administrative Law Treatise §14:22, at pp.104-05 (2d ed. 1980). Indeed, in the first *Chenery* case, this Court stated that "the orderly functioning of the process of review requires that the grounds upon which the agency acted be clearly disclosed and adequately sustained," and that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 94 (1943). Subsequently, this Court held that "*Chenery* requires that an agency's discretionary order be upheld, if at all, on the basis articulated *in the order* by the agency itself." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)(emphasis added). Even the government does not claim that the basis on which it now seeks to justify the testing at issue in this case was articulated in the agency's order, *i.e.*, the EOP Plan. Pet. App. 77a-107a. Indeed, the government concedes that it has only become

"clear *in this litigation* that the petitioners who are the subject of this appeal have been identified for random drug testing because they hold secret security clearances." Opp. at 9 (emphasis added). More precisely, this rationale became "clear" only in the wake of *Harmon*, which was decided after the EOP Plan had been promulgated and after this lawsuit had been filed. Thus, Respondents' assertion that "there is no uncertainty with respect to *how* employees have been selected for random testing," Opp. at 9, is correct: There is no uncertainty at all that the selection was *not* made upon the basis on which it is now defended. Accordingly, whether or not the APA applies to drug testing plans, the government's *per se* testing rationale adopted during the course of litigation is not entitled to deference, and the EOP plan cannot be sustained on that basis.[2]

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2 The government notes that the court of appeals did not address this issue. Opp. at 9. However, it was presented to that court and is properly before this Court.

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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